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The Emergency Alternative Arrangement Exception to
the National Environmental Policy Act:
What Constitutes an Emergency?

Should the Navy Pin Its Hopes on Noah Webster?

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“Laws are silent in the time of war.”

Marcus Tullius Cicero, 106 B.C. – 43 B.C.

I. Introduction

The world has come a long way from Ancient Rome, but today, the proposition still lingers. When does the interest of national security trump environmental laws? When can a federal agency such as a branch of the armed forces say, “yes, we agree that protection of the environment is important, but what we have to do *right now* is more important”? How urgent is urgent? Or more basically, when is an emergency, an “emergency”?

In 1969, the National Environmental Policy Act (NEPA)¹ was enacted to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation... .”² NEPA is essentially a procedural mechanism to force federal agencies to consider the environmental impacts of their proposed actions.

There are no exceptions in the Act. The regulations implementing NEPA, however, do have an emergency exception. Section 1506.11 of Title 40 of the Code of Federal Regulations states:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions in these regulations, the Federal agency taking the action should consult with the Council [on Environmental Quality] about alternate arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency.

¹ 42 U.S.C. § 4321 *et seq.* (2009).

² 42 U.S.C. § 4321.

While this exception has not been used very often,³ it was central to the U.S. Navy's position in the case of *Winter v. NRDC*.⁴ In that case, the U.S. Navy, after consulting with the Council on Environmental Quality [CEQ] and getting their approval, claimed the emergency exception as to why the Navy did not prepare an Environmental Impact Statement (EIS) before conducting a series of training exercises in the Pacific Ocean off the Southern California coast. These exercises use mid-frequency active sonar, which the President of the United States has determined that the use of which is "essential to national security."⁵ The Natural Resources Defense Council, along with various other groups, claims that mid-frequency active sonar harms marine animals, and an EIS was required. They filed for and were granted a preliminary injunction by the U.S. District Court for the Central District of California, which was affirmed by the Ninth Circuit.⁶ The Supreme Court reversed the lower court, and vacated the preliminary injunction to the extent of the Navy's challenge of certain of its provisions. The majority of the Court did not, however, reach an opinion as to the validity of the Navy's use of the emergency exception under 40 C.F.R. § 1506.11, leaving the question unanswered.

This paper will explore the emergency exception to NEPA under 40 C.F.R. § 1506.11, by looking at what situations it has been used in, determining that it was properly invoked by the government in *NRDC v. Winter*, and hypothesizing as to its usefulness to the U.S. Navy in similar situations.

³ It has been requested of CEQ only 41 times. See U.S. Congressional Research Service. Environmental Exemptions for the Navy's Mid-Frequency Active Sonar Training Program (RL 34403: Aug. 27, 2008), by Kristina Alexander [hereinafter CRS Report].

⁴ 129 S. Ct. 365 (2008). For simplicity, while the case was *NRDC v. Winter* in the lower courts, when the Navy petitioned for certiorari, it was renamed *Winter v. NRDC*, and will henceforth be referred to as such.

⁵ Press Release, U.S. Department of Defense, Navy Granted Authority To Use Sonar In Training Off California (Jan. 16, 2008) (on file with author).

⁶ 518 F.3d 658 (9th Cir. 2008) (*affirming* 530 F. Supp. 2d 1110 (C.D. Cal. 2008)).

II. The National Environmental Policy Act

A. Purpose/History

The National Environmental Policy Act [NEPA] was enacted in 1970, and was one of the first modern federal environmental statutes. It established environmental policies and goals, and created the President's Council on Environmental Quality [CEQ]. Rather than a regulatory statute, it is an informational one, requiring the federal government to prepare and make public information about the environmental effects of certain actions it is going to take, and propose alternatives to such actions. The thought is that a better-informed decision-maker will improve the quality of its final decisions, and that a better-informed public will keep the process honest.

There was opposition by many members of Congress to NEPA, and they intended to limit NEPA compliance, but the drafters sought to ensure that NEPA would have uniform application.⁷ By delegating enforcement to the Executive Branch (through the CEQ) and the Judiciary Branch (through judicial review), the drafters hoped that the structure of the Act would block efforts to avoid NEPA's requirements.⁸

When enacted, the only similar precedent existing federal legislation was the Full Employment Act of 1946, which declared a historic national policy on the management of the economy, and established the Council of Economic Advisers.⁹ Senator Henry Jackson hoped that NEPA would provide "an equally important national policy for the management of America's future environment."¹⁰ "... [I]t is my view that S. 1075 as passed by the Senate and now, as agreed upon by the conference committee, is the most important and far-reaching

⁷ Aaron Ehrlich, *In Hidden Places: Congressional Legislation That Limits the Scope of the National Environmental Policy Act*, 13 HASTINGS W.-N.W.J. ENV. L. & POL'Y 285, 285 (2007).

⁸ *Id.* at 285 (citing H.R.Rep. No. 91-379 at 2754).

⁹ 115 CONG. REC. 40415, 40416 (1960) (Mr. Jackson).

¹⁰ *Id.*

environmental and conservation measure ever enacted by Congress.”¹¹ Senator Jackson viewed NEPA as Congress’ declaration that the federal government will not intentionally initiate actions which will do irreparable harm to the land, air, and water that support all life on Earth.¹² However, he also did not see NEPA as the total solution for the environmental problems plaguing the country at the time. “While the National Environmental Policy Act of 1969 is not a panacea, it is a starting point.”¹³ So important did Senator Jackson and the other drafters of the original Senate bill view the environment, the first draft of S 1075 used the phrase “each person has a fundamental and inalienable right to a healthful environment” in its declaration of policy. That language did not survive the conference committee, however, and was changed to the current language of “each person should enjoy a healthful environment.”¹⁴ Senator Jackson was clear that if there are departures from the standard of excellence that the Act has as a goal, they should be exceptions, not the rule, and as exceptions, they must be justified in the light of public scrutiny.¹⁵

Another big proponent of NEPA was Senator Allott. As he put it, by enacting NEPA, “...Congress is not giving the American people something, rather the Congress is responding to the demands of the American people.”¹⁶ “In this case, government response cannot be too soon. We can only hope that it is not too late.”¹⁷ He also recognized that the environment and how we dealt with it does not fall on a single governmental agency, and that NEPA recognizes that fact, which gives it its strength, appropriateness, and timeliness.¹⁸

¹¹ *Id.*

¹² *Id.* at 40416.

¹³ *Id.* at 40417.

¹⁴ *Id.* at 40416.

¹⁵ *Id.*

¹⁶ *Id.* at 40422.

¹⁷ *Id.* at 40422.

¹⁸ *Id.* at 40423.

Senator Allott described the background of NEPA and its creation of the CEQ in his comments to the conference committee.

The concept of a high-level council on conservation, natural resources, and environment has had congressional expression for nearly a decade.... It first found legislative support from a former Chairman of the Senate Interior Committee, the late Senator Murray. In the 86th Congress, he introduced S. 2549, the Resources and Conservation Act, which would have established a high-level council of environmental advisors along with the first expression of a comprehensive environmental policy. Bills of similar purpose were also introduced in the 89th and 90th Congress.¹⁹

During the 91st Congress, three bills dealing with environmental policy and creation of new overview institutions were introduced and referred to the Senate Interior Committee, and these became S. 1075.²⁰ During this time, President Nixon had expressed concern over the degradation of the nation's environment, and had committed himself during his 1968 campaign to a policy of improving the environment. In a radio address he gave on October 18, 1968, he said, "the battle for the quality of the American environment is a battle against neglect, mismanagement, poor planning and a piecemeal approach to problems of natural resources."²¹ It was against this backdrop that NEPA and the CEQ were created.

B. Policies

Section 4331 of NEPA outlines very broad national policies regarding the protection of the environment. The section states that it is the continuing responsibility of the Federal Government to use "all practicable means, consistent with other essential considerations of national policy" to improve and coordinate plans and programs, and lists six general goals, as

¹⁹ *Id.* at 40422.

²⁰ *Id.* at 40422.

²¹ *Id.* at 40422 (*citing* President Richard Nixon radio address, October 18, 1968, "A Strategy of Quality: Conservation in the Seventies").

generic as “attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”²²

The key section to NEPA is Section 4332, which directs federal agency action. To the “fullest extent possible,” all federal agencies must include in their proposals for major federal actions that significantly affect the quality of the human environment, a detailed statement concerning the environmental impact.²³ These detailed statements must include any adverse environmental impacts that cannot be avoided, alternatives to the proposed action, analysis on the relationship between short-term uses and maintenance and the enhancement of long-term productivity, and any irreversible commitment of resources.²⁴ Prior to doing an environmental statement, the federal agency must consult with and get comments from any other federal agency that has jurisdiction or special expertise in any environmental impact involved. Copies of these comments are to go to the President, the CEQ, and the public.²⁵

C. Council on Environmental Quality

Section 4342 of NEPA created the Council on Environmental Quality [CEQ], as an advisor to the President on environmental issues. The CEQ was to be composed of three members who are appointed by the President by and with advice and consent of the Senate, and the President was to appoint one of the members as the Chairman.²⁶ Each member was to be “exceptionally well qualified” by way of his training, experience, and attainments, to analyze and

²² 42 U.S.C. § 4331(b). The other five goals are: “(1) fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assur[ing] for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings; ... (4) preserv[ing] important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) acheiv[ing] a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and (6) enhanc[ing] the quality of renewable resources and approach the maximum attainable recycling of depletable resources.”

²³ § 4332(c).

²⁴ § 4332(c).

²⁵ § 4332(c).

²⁶ § 4342.

interpret environmental information and trends, to appraise programs and activities of the federal government in light of NEPA's established policies, to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interest of the country, and to formulate and recommend national policies to promote the improvement of the quality of the environment.²⁷

However, in 2005, Public Law 109-54 reduced the number of members to just one, who serves as the Chairman.²⁸ The Environmental Quality Improvement Act of 1970 provided additional responsibilities to the CEQ, in addition to the duties and functions spelled out in Section 4344 of NEPA.²⁹ According to CEQ's official website, their mission is to coordinate federal environmental efforts, and work closely with agencies and other White House offices in the development of environmental policies and initiatives.³⁰ The CEQ reports annually to the President on the state of the environment, overseas federal agency implementation of the EIS process, and acts as a referee when agencies cannot agree on the adequacy of EIS's.³¹ The Chairman serves as the principal environmental advisor to the President.³²

In 1977, President Jimmy Carter issued Executive Order 11,991 directing CEQ to publish new regulations.³³ This was in response to inconsistent application of NEPA's requirements by

²⁷ § 4342.

²⁸ § 4342.

²⁹ See <http://www.whitehouse.gov/administration/eop/ceq/>.

³⁰ *Id.*

³¹ *Id.*

³² Nancy Sutley is President Obama's appointment as CEQ Chairman. Prior to the appointment, she was the Deputy Mayor for Energy and Environment for Los Angeles, and she holds a BA from Cornell and a Masters in Public Policy from Harvard. *Id.*

³³ 3 C.F.R. § 123 (1978).

federal agencies in the early 1970's.³⁴ In 1978, CEQ issued regulations that forced compliance with the procedures of NEPA and encouraged uniformity in the preparation of EIS's.³⁵

D. Process

The main tool in the NEPA process is an “environmental impact statement” [EIS], which is a very detailed report on the environmental impacts, positive and negative, and the alternatives to the proposed action. All federal agencies are required to go through this process whenever they propose any major federal action significantly affecting the quality of the human environment.³⁶ Courts have construed the term “major” in a number of different ways.³⁷ The CEQ regulations construe it together with “significantly,”³⁸ and say that if a proposed action has a significant environmental effect, it is subject to NEPA regardless of whether it is otherwise major or minor. This essentially eliminates the word “major” from NEPA.³⁹ The regulations state that “major/significantly affecting” does not have precise criteria, but should be considered on a case-by-case basis.⁴⁰

“Federal action” includes not only actions by the federal government, but also federal authorization of actions by private parties and some federally funded activities.⁴¹ “Actions” can

³⁴ Robert Orsi, *Comment: Emergency Exceptions From NEPA: Who Should Decide?*, 14 B.C. ENVTL AFF. L. REV. 481, 483 (1987).

³⁵ *Id.* See also 40 C.F.R. § 1500 *et seq.* (2009).

³⁶ 42 U.S.C. § 4332(C).

³⁷ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[2][a].

³⁸ “Major reinforces but does not have a meaning independent of significantly” 40 C.F.R. § 1508.18.

³⁹ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[2][a]. A second approach construes “major” as a modifier of “federal,” which has the effect of placing actions that are marginally federal outside of NEPA’s scope. See *District of Columbia v. Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980). A third approach construes “major” independently from either “significantly” or “federal.” See *Minn. Pesticide Info. & Educ. Inc. v. Espy*, 29 F.3d 442, 443 (8th Cir. 1994). This approach requires a finding that a proposed action is both major and significant, but no court has ever found that an action with a significant effect is not subject to NEPA because it is minor. See *Sugarloaf Citizens Ass’n v. Fed. Energy Regulatory Comm’n*, 959 F.2d 508, 513-14 (4th Cir. 1992); *Goos v. ICC*, 911 F.2d 1283, 1295-96 (8th Cir. 1990), *NAACP v. Med. Center, Inc.*, 584 F.2d 619, 629 (3d Cir. 1978).

⁴⁰ 40 C.F.R. §§ 1508.27, 1508.3, 1508.8.

⁴¹ 40 C.F.R. § 1502.4.

be one of three types: 1) proposals sufficiently concrete and definite;⁴² 2) inactions;⁴³ or 3) proposals for legislation by federal agencies.⁴⁴ Lastly, “human environment” includes the natural and physical environment and the relationship of people with that environment. It does not include solely economic or social effects.⁴⁵

1. Environmental Impact Statements

Section 1502.3 of the CEQ regulations lay out the statutory requirement of EIS’s.

The EIS process can be boiled down to four basic parts:

1. Identify whether an EIS is required;
2. Prepare a draft EIS and offer it to the public for comment;
3. Prepare a final EIS; and
4. Issue the Record of Decision.

If an EIS is going to be necessary, the federal agency publishes a “notice of intent” that it is going to prepare one, and then the agency goes through the “scoping” process. Scoping identifies the coverage of the EIS and significant issues that will be addressed.⁴⁶ To determine the scope of an EIS, the agency must consider three types of actions,⁴⁷ three types of alternatives,⁴⁸ and three types of impacts.⁴⁹ The agency must invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might oppose the action on environmental grounds), unless there is a limited exception under section 1507.3(c). The agency should also

⁴² See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

⁴³ CEQ regulations include “failure to act,” *but see* *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), which said no.

⁴⁴ 40 C.F.R. § 1508.23.

⁴⁵ 40 C.F.R. § 1508.14.

⁴⁶ 40 C.F.R. § 1508.25.

⁴⁷ Connected, cumulative, and similar. *Id.*

⁴⁸ No action alternative, other reasonable courses of action, and mitigation measures not in the proposed action. *Id.*

⁴⁹ Direct, indirect, and cumulative. *Id.*

hold early scoping meetings which may be integrated with any other early planning meeting the agency has. An agency shall revise the determinations made if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.⁵⁰

Once scoping is complete, the agency does a draft EIS, which is a full analysis of the project, including a description of the proposed action, discussion of alternatives, including actions to mitigate any adverse effects, and discussion of the environmental consequences of the actions and alternatives.⁵¹ This draft is then made available to the public, as well as other agencies for their input. The agency has the discretion as to whether to hold public meetings. Any comments made by the public and other agencies become part of the administrative record.⁵²

The agency must respond to any comments in its final EIS, and may modify the EIS in order to reflect comments. It can, but is not required to, resubmit the EIS for public comment after modification. A “record of decision” is then issued, stating what the final decision was, identifying all alternatives considered by the agency in reaching that decision (specifying the alternatives which were considered to be environmentally preferable⁵³), and stating whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why not.⁵⁴

As far as time limits for the entire NEPA process, CEQ decided not to set a specific limitation, but the regulations encourage federal agencies to set specific time lines for individual

⁵⁰ 40 C.F.R. § 1501.7.

⁵¹ 40 C.F.R. § 1502.9.

⁵² 40 C.F.R. §§ 1502.19, 1503.

⁵³ An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision. 40 C.F.R. § 1505.2.

⁵⁴ 40 C.F.R. § 1505.2.

actions, and set out factors for consideration. The regulations also encourage agencies to designate a specific person to expedite the NEPA process.⁵⁵ Section 1506.10 does specify that no decision on the proposed action can be made by the agency until 90 days from the publishing of the draft EIS has passed, or 30 days from the final EIS. However, if the final EIS is filed within the 90-day window after the draft EIS was published, the times run concurrently, but at least 45 days must be allowed for public comment on the draft.⁵⁶

2. Environmental Assessments/Findings of No Significant Impact

If the proposed action is not exempt from the EIS requirement, the agency must determine whether it meets the EIS threshold, and a common way to do that is to prepare an “environmental assessment” (EA). This is a concise document, which includes brief discussions of the need for the proposal, of alternatives, of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. Its purpose is to briefly provide enough evidence and analysis for determining whether to prepare an EIS or to make a finding of no significant impact, aid an agency's compliance with NEPA when no EIS is necessary, and facilitate preparation of an EIS when one is necessary.⁵⁷ If an agency knows from the beginning that an EIS will be necessary, it need not prepare an EA as well.

A “finding of no significant impact,” or FONSI, is a document by a Federal agency briefly stating why an action, not otherwise excluded, will not have a significant effect on the human environment and therefore an environmental impact statement will not be prepared. It must include the environmental assessment or a summary of it and note any other environmental documents related to it.⁵⁸ FONSI's must be made available to the public.⁵⁹

⁵⁵ 40 C.F.R. § 1501.8.

⁵⁶ 40 C.F.R. § 1506.10.

⁵⁷ 40 C.F.R. §§ 1508.9, 1501.3.

⁵⁸ 40 C.F.R. §§ 1508.13, 1501.7(a)(5).

3. Judicial Review

NEPA does not have a citizen suit provision, nor authorize civil penalties against agencies that fail to comply with its provisions. The judicial avenue for the public is therefore under the Administrative Procedure Act, Sections 703 and 704, with the remedy being injunctive relief. The APA provides judicial review of final agency actions for which there is no adequate remedy in a court. Courts can review both the decision not to do an EIS, and whether an EIS was done in compliance with NEPA. The standard of review is whether agency action or inaction was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.⁶⁰

E. Exemptions/Exceptions

Some environmental statutes actually originated in disasters.⁶¹ The Torrey Canyon oil tanker spill in 1967, and the Santa Barbara Channel oil spill in 1968, helped the push for the Federal Water Pollution Control Act of 1972, which in turn required the newly-created EPA to promulgate the National Oil and Hazardous Materials Contingency Plan.⁶² The 1973 crash of a cargo jet loaded with hazardous materials at Logan International Airport in Boston led to the Hazardous Materials Transportation Act of 1975.⁶³ The Toxic Substances Control Act and the Resource Conservation and Recovery Act of 1976 were due to the exposure of factory workers in Virginia to the chemical Kepone.⁶⁴ While the most notorious example is the 1978 Love Canal incident in Niagara Falls, New York, which inspired the Comprehensive Environmental

⁵⁹ 40 C.F.R. §§ 1506.6.

⁶⁰ 5 U.S.C. § 706(2)(A) (2009).

⁶¹ Michael B. Gerrard, *Emergency Exemptions From Environmental Laws After Disasters*, 20 NAT. RESOURCES & ENV'T 10, 10 (2006).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Response, Compensation, and Liability Act,⁶⁵ the most terrible disaster was the 1984 release of methyl isocyanate at a Union Carbide plant in Bhopal, India, which killed several thousand people. This, plus the chemical release in West Virginia, that fortunately did not result in any deaths, led to the Emergency Planning and Community Rights-to-Know Act of 1986, requiring state and local emergency planning, as well as the compilation and disclosure of extensive information about chemical usage.⁶⁶ Most recently, the Exxon Valdez oil spill in Alaska in 1989 led to the Oil Pollution Act of 1990.⁶⁷

That being said, some have urged Congress to adopt emergency exemptions so that environmental laws do not interfere with rescue and recovery efforts.⁶⁸ However, recent disasters such as 9/11 and Hurricane Katrina have shown that perhaps that is not the way to go. After 9/11, some of the demolition, transport, and disposals operations that took place may have violated a variety of environmental laws. For a large demolition project, there should have been preparation of an EIS or EA, advance notice of asbestos removal, source separation, and many other procedures, none of which were followed.⁶⁹ And no one said a thing -- no environmental agency or advocacy group.⁷⁰

There is a New York law that gives the governor the right to temporarily suspend part of any state or local laws during a state disaster.⁷¹ New York's State Environmental Quality Review Act exempts

emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 11.

⁷¹ *Id.* at 11. See NY CLS Exec § 29-a (2009).

performed to cause the least change or disturbance, practicable under the circumstance, to the environment.⁷²

The state courts have interpreted this provision broadly to include events such as prison overcrowding and homelessness.⁷³

On the federal side, when the Federal Emergency Management Agency (FEMA) declared on September 11, 2001 that New York City was a disaster area, certain exemptions from federal environmental laws were triggered.⁷⁴ Most notably, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act,⁷⁵ the federal emergency response was mostly exempted from NEPA.⁷⁶ Most of the exemptions are specifically for disaster relief, but the Act also allows for NEPA exemption for emergency relief. To that end, Section 102 of the Act defines “emergency” as

any occasion or instances for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.⁷⁷

The existence of the Stafford Act and its nullification of NEPA requirements for federal actions call into question the need and purpose behind section 1506.11. However, Stafford is for disaster emergencies, which is a subset of “emergencies,” which supports the Navy’s use of 40 C.F.R. § 1506.11 in the *Winter v. NRDC* case.⁷⁸

Similarly, with respect to Hurricane Katrina, even before landfall, the governors of Louisiana and Mississippi both declared a state of emergency.⁷⁹ On August 29th, 2005, the day

⁷² Gerrard, *supra* note 61, at 11 (*quoting* 6 N.Y.C.R.R. § 617.5(c)(33) (2009)).

⁷³ *Id.* See Bd. of Visitors-Marcy Psychiatric Ctr. v. Coughlin, 453 N.E.2d 1085 (N.Y. 1983).

⁷⁴ Reconstruction after 9/11 did involve NEPA, and four EIS’s were completed. Gerrard, *supra* note 61, at 11.

⁷⁵ 42 U.S.C. § 5121-5207 (2009).

⁷⁶ Gerrard, *supra* note 61, at 11.

⁷⁷ 42 USC § 5122(1).

⁷⁸ See *infra* Section IV.B.

⁷⁹ Gerrard, *supra* note 61, at 12.

the hurricane hit, FEMA declared both states to be disaster areas.⁸⁰ Many emergency orders followed, exempting different operations from the standard environmental requirements.⁸¹ For example, exemptions were granted for discharging pumped water into Lake Pontchartrain without a NPDES permit under the CWA, for depositing into wetlands without a CWA 404 permit, as well as four different waivers of the Clean Air Act regarding fuel requirements.⁸²

In November 2005, the American Bar Association's Section of Environment, Energy, and Resources expressed its concerns to the EPA about expanded exemptions to environmental laws in general.⁸³ "[T]he risks accompanying blanket exemptions to environmental regulations should not be removed without individual consideration of the dangers at issue."⁸⁴

Congress has shown a greater willingness for passing NEPA exemptions than exemptions from other environmental statutes.⁸⁵ While CEQ regulations provide for emergency exemptions from NEPA, Congress has consistently chosen to enact project specific exemptions instead of allowing agencies to use section 1506.11.⁸⁶ A comprehensive list of congressional legislation that provided exemptions or modifications to NEPA is difficult to compile, due to the fact that Congress tends to provide specific exemptions in appropriation bills, buried in thousands of piles of provisions.⁸⁷ A second reason is that often Congress does not mention NEPA by name in the legislation, but instead relies upon language that implicitly exempts or modifies NEPA's

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 14.

⁸⁴ *Id.*

⁸⁵ Ehrlich, *supra* note 7, at 286 (citing Victor Sher and Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Law*, 15 HARV. ENVTL. L. REV. 435, 438 (1991)).

⁸⁶ *Id.* at 286 (citing Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 486 (1997)).

⁸⁷ *Id.* at 286-87. See generally Richard Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L. J. 619 (2006).

application to the project.⁸⁸ An example of this is language such as legislation that directs action “notwithstanding any other provision of law.” Courts have interpreted this to mean that the new statute supersedes or trumps other statutes that are not inconsistent, including NEPA.⁸⁹

Also making the task more difficult is that Congress often includes provisos that eliminate or limit the scope of judicial review, and therefore there is less case law discussing such exemptions.⁹⁰

1. Types of Exemptions to NEPA

Public Law 106-398, § 1 of October 30, 2000, provided that nothing in NEPA nor in any implementing regulations shall require the Secretary of Defense or the Secretaries of any of the military branches to prepare a programmatic nation-wide environmental impact statement for low-level flight training as a precondition to the use by the military of airspace for the performance of low-level training flights.⁹¹

a. Congressional Exemptions

If a federal statute is in “clear and unavoidable conflict” with NEPA, then the federal agency is exempt from compliance with NEPA.⁹² While these types of legislative exemptions are rare,⁹³ they include impositions by Congress of a mandatory duty on an agency,⁹⁴ a direction

⁸⁸ Ehrlich, *supra* note 7, at 287 (citing *Nat’l Coalition to Save our Mall v. Norton*, 161 F. Supp. 2d 14, 20-21 (D.D.C. 2001)).

⁸⁹ *Nat’l Coalition to Save our Mall*, 161 F. Supp. 2d at 20.

⁹⁰ Ehrlich, *supra* note 7, at 287 (citing *Sher & Hunting*, *supra* note 85, at 438).

⁹¹ Note to Sec. 2.

⁹² 1-1 ENVTL LAW PRACTICE GUIDE § 1.04 [4]. See *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977).

⁹³ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]. See, e.g., *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991) (Safe Water Drinking Act); *Wyoming v. Hathaway*, 525 F.2d 66, 71-73 (10th Cir. 1975) (Federal Insecticide, Fungicide, and Rodenticide Act), *cert. denied*, 426 U.S. 906 (1976); *Warren County v. North Carolina*, 528 F. Supp. 276, 286-87 (E.D.N.C. 1981) (Toxic Substances Control Act).

⁹⁴ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]. See *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (biological assessment under Endangered Species Act cannot substitute entirely for environmental assessment despite Congress’ declaration that assessment may be prepared as part of NEPA process).

to an agency that precludes the agency from considering environmental factors in its decision,⁹⁵ or replacement of NEPA procedures with other procedures.⁹⁶ The courts are split as to the issue of whether such exemptions must be explicit or whether they can be implied.⁹⁷

Most importantly, Congress at any point has the power to make specific statutory exemptions. For example, under the Clean Air Act, EPA's actions are exempt from NEPA requirements.⁹⁸ Similarly, under the Clean Water Act, EPA actions other than providing grants to municipal wastewater treatment plants and issuing NPDES permits to new sources are exempt.⁹⁹

Congress has barred federal courts from exercising jurisdiction to determine whether an agency has complied with NEPA for a specific action,¹⁰⁰ and implicitly for certain types of actions.¹⁰¹

Congress has acted explicitly in rare circumstances to continue a program that would have been delayed or even halted by NEPA.¹⁰² For example, in the case of Earth Resources Co.

⁹⁵ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]. See *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764 (9th Cir. 1986) (compliance with NEPA was not full compliance with Federal Land Policy and Management Act); *Nat'l Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245, 1255 (D.D.C. 1977) (compliance with NEPA was not full compliance with Fish and Wildlife Coordination Act).

⁹⁶ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]; 40 C.F.R. § 1506.11.

⁹⁷ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]. See *Nat'l Audubon Soc'y v. Hester*, 801 F.2d 405, 408 (9th Cir. 1986); *Crosby v. Young*, 512 F. Supp. 1363, 1386 (E.D. Mich. 1981).

⁹⁸ Contained in the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1) (2009).

⁹⁹ 33 U.S.C. § 1372(a) (2009).

¹⁰⁰ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]. See *Apache Survival Coalition v. United States*, 21 F.3d 895, 904 (9th Cir. 1994) (statute deeming that requirements of NEPA had been met regarding agency's approval of specified projects was not unconstitutional); *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993) (NEPA once again applied to decisions regarding logging in spotted owl habitat); *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32 (D.C. Cir. 1990) (1987 Continuing Appropriations Act provided that no court had jurisdiction to consider factual or legal sufficiency of EIS prepared for specific proposal), *cert. denied*, 502 U.S. 809 (1991); *Env'tl Def. Fund, Inc. v. Higginson*, 655 F.2d 1244, 1246, (D.C. Cir. 1981) (rider to appropriations bill for Department of Interior declared that action should proceed as if final EIS had been filed).

¹⁰¹ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[4]. See *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990) (trial court did not have jurisdiction to consider whether EPA complied with NEPA in selecting remedy under CERCLA because jurisdiction to review NEPA actions is provided by 28 U.S.C. § 1331 and 5 U.S.C. § 702, and CERCLA precludes review under those statutes), *cert. denied*, 498 U.S. 981 (1990).

¹⁰² Orsi, *supra* note 34, at 495 (citing *Alaska Natural Gas Transportation Act*, 15 U.S.C. § 719(h)(c)(3) (1982); *The Federal-Aid Highway Act of 1973*, Pub. L. No. 93-87, § 154, 87 Stat. 250, 275 (1973)). Other projects exempted

of Alaska v. FERC,¹⁰³ litigation under NEPA caused work on the Alaska pipeline to stop. Congress restarted the project by enacting legislation making the President's decisions on the adequacy of an EIS conclusive, and by denying judicial review.¹⁰⁴ Congress chose to specifically exempt other federal projects in the Energy Supply and Environmental Coordination Act of 1974,¹⁰⁵ Disaster Relief Act of 1974,¹⁰⁶ and Regional Rail Reorganization Act of 1973.¹⁰⁷

b. Regulatory Exceptions

On November 29th, 1978, in 40 C.F.R. § 1506.11, the CEQ created the “emergency” exception to the requirement to prepare an EIS.¹⁰⁸ It was part of the initial regulations created for CEQ to implement NEPA in response to Executive Order 11991 of June 9th, 1978. The regulation has no direct statutory authority, but can be supported by 42 U.S.C. § 4331(b), which says that it is the U.S. government's responsibility to “use all practicable means consistent with other essential considerations of national policy” when considering the environmental impacts of its actions.¹⁰⁹ The final version of the emergency exception was only slightly different from the draft.¹¹⁰ The initial wording said that under emergency circumstances, “the Federal agency proposing to take the action should consult with the Council about alternative arrangements.”¹¹¹ Out of concern that the regulation could be construed as requiring consultation before an emergency occurred,¹¹² the regulation was changed to read as it does today.¹¹³ Under this

from NEPA include the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1) (1982); Disaster Relief Act of 1974, 42 U.S.C. § 5175 (1982); and the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 791(c) (1976).

¹⁰³ 617 F.2d 775 (D.C. Cir. 1980).

¹⁰⁴ Orsi, *supra* note 34, at 495. See *Earth Res Co. of Alaska v. FERC*, 617 F.2d 775 (D.C. Cir. 1980).

¹⁰⁵ 15 U.S.C. § 793(c)(1) (1982).

¹⁰⁶ 42 U.S.C. § 5175 (1984).

¹⁰⁷ 45 U.S.C. § 791(c) (1976).

¹⁰⁸ 43 Fed. Reg. 55978.

¹⁰⁹ CRS Report, *supra* note 3, at CRS-9.

¹¹⁰ *Id.* at CRS-10.

¹¹¹ 43 Fed. Reg. 25230, 25243 (June 9, 1978).

¹¹² 43 Fed. Reg. 55978, 55988 (Nov. 29, 1978).

exception, once CEQ determines that an emergency exists, it requires consultation between the agency and CEQ to prepare alternative arrangements to the preparation of an EIS.¹¹⁴ However, CEQ has not defined what situations it considers an emergency.¹¹⁵ Furthermore, CEQ has not stated that § 1506.11 waives the statutory requirements for preparing an EIS. That is to say, if an agency has an emergency situation, can it undertake the major federal action without ever doing an EIS? The alternative is that it would undertake the action first, and then do an EIS, which runs contrary to the one of the purposes behind NEPA, which is to give decision-makers enough information in order to make an intelligent decision.

Air Force regulations regarding the environmental impact analysis process allows for special and emergency procedures.¹¹⁶ While the regulation makes clear that emergency situations do not exempt the Air Force from complying with NEPA, “[c]ertain emergency situations may make it necessary to take immediate action having significant environmental impact, without observing all the provisions of the CEQ regulations.... If possible, promptly notify [headquarters], for ... coordination and CEQ consultation, before undertaking emergency actions that would otherwise not comply with NEPA.... The instant notification requirement does not apply where emergency action must be taken without delay. Coordination in this instance must take place as soon as practicable.”¹¹⁷ In applying this exception, the courts do not simply allow Department of Defense agencies to bypass NEPA, but will allow a military department to make a decision without going through public notice and comment requirements.¹¹⁸

¹¹³ CRS Report, *supra* note 3, at CRS-10.

¹¹⁴ Orsi, *supra* note 34. 40 C.F.R. § 1506.11.

¹¹⁵ Orsi, *supra* note 34, at 484.

¹¹⁶ 32 C.F.R. § 989.34(b) (2009).

¹¹⁷ *Id.*

¹¹⁸ Colonel E.G. Willard, Lieutenant Colonel Tom Zimmerman, and Lieutenant Colonel Eric Bee, *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and*

From November 1977 to September 2008, 41 alternative arrangements have been granted by CEQ.¹¹⁹ Of these, the highest number (twelve) dealt with water issues, followed by spraying of pesticides, killing of wildlife, military and military support, each at four.¹²⁰ Other random issues involved tree removal, dealing with fires, dealing with radioactive material, and the like.¹²¹ Not surprisingly, the agency with the most requests for emergency exceptions was the U.S. Forest Service, followed by the Bureau of Land Management.¹²² The various military departments of the Department of Defense requested emergency exceptions nine times – four from the Department of Army, two from the Department of Air Force, two from Army Corps of Engineers, and only one from the Department of the Navy.¹²³ The Bureau of Land Management has used 40 C.F.R. § 1506.11 several times when it needed to build roads to provide access to a forest fire on their lands

c. Exceptions Through Case Law

Courts have generally held that federal agencies, and in particular EPA, do not have to prepare an EIS when it has already prepared a “functional equivalent.”¹²⁴ This doctrine states that when a federal agency must comply with procedures mandated by other federal statutes with regard to a proposed action, and when compliance with these procedures is the equivalent of

Operational Prerogatives without New Legislation?, 54 A.F. L. REV. 65, 82 (2004). See *Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214 (9th Cir. 1979).

¹¹⁹ Alternative Arrangements Pursuant to 40 CFR Section 1506.11-Emergencies (Sept. 2008), available at http://www.nepa.gov/eisnepa/eis/alternative_arrangements_chart_092908.pdf [hereinafter Alternative Arrangements Chart]; 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[7].

¹²⁰ Alternative Arrangements Chart, *supra* note 119.

¹²¹ *Id.*

¹²² *Id.* Forest Service and APHIS combined equaled a total of ten USDA requests, and BLM combined with US Fish & Wildlife Service combined equaled a total of nine Department of the Interior requests.

¹²³ *Id.*

¹²⁴ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[6].

compliance with NEPA, the agency does not have to duplicate procedures.¹²⁵ This doctrine has been applied mainly to regulatory actions taken by EPA.¹²⁶

The general rule concerning extraterritoriality is that federal statutes are not presumed to apply outside of the United States unless there is clear indication by Congress. There is case law to say that NEPA does not apply to certain military actions on U.S. installations located in Japan,¹²⁷ nor to movement of U.S. munitions through Germany.¹²⁸ The *EDF v. Massey* case¹²⁹ held that NEPA did apply to US action in Antarctica, but due to the particular nature of Antarctica not being part of any nation's sovereignty.

The CEQ has issued guidance on NEPA analyses for proposed federal actions in the United States that may have effects extending across the border and affecting another country's environment.¹³⁰ CEQ determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States. As a practical consideration, CEQ noted that federal agencies should use the scoping process set out in CEQ's NEPA regulations, 40 C.F.R. § 1501.7, to identify actions that may have such effects, and "should be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the natural ecosystem that cross borders... ."

¹²⁵ *Id.* See, e.g., *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991) (Safe Drinking Water Act); *Wyoming v. Hathaway*, 525 F.2d 66, 71-73 (10th Cir. 1975) (Federal Insecticide, Fungicide, and Rodenticide Act), *cert. denied*, 426 U.S. 906 (1976); *Warren County v. North Carolina*, 528 F. Supp. 276, 286-87 (E.D.N.C. 1981) (Toxic Substances Control Act); *Maryland v. Train*, 415 F. Supp. 116, 121-22 (D. Md. 1976) (Ocean Dumping Act). See generally *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504-05 (11th Cir. 1990) (discussing functional equivalency doctrine).

¹²⁶ 1-1 ENVTL LAW PRACTICE GUIDE § 1.04[6]. See cases cited in note 125. *Cf.* *Found on Econ. Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985) (NIH procedures for approving experiment involving genetically engineered organisms, conducted under agency guidelines, were not functional equivalent of environmental assessment). *But see* *D'Agnillo v. U.S. Dept. of Hous. and Urban Dev.*, 738 F. Supp. 1454, 1460 (S.D.N.Y. 1990) (supplemental environmental review prepared by HUD was functional equivalent of comprehensive finding of no significant impact), *aff'd*, 923 F.2d 17 (2d Cir. 1991), *cert. denied*, 501 U.S. 1254 (1991).

¹²⁷ *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

¹²⁸ *Greenpeace USA v. Stone*, 924 F.2d 175 (9th Cir. 1991).

¹²⁹ 986 F.2d 528 (D.C. Cir. 1993).

¹³⁰ CEQ memorandum of July 1, 1997.

d. Categorical Exclusions

A categorical exclusion (also known as a “CATEX”) is not an exemption from NEPA, but instead is an administrative way to simplify the paperwork for actions that do not have significant environmental impacts.¹³¹ Federal agencies publish a list of types of actions that they perform in a regular basis that do not significantly affect the environment. For example, the Navy currently has 45 different CATEX’s, for actions such as routine use of existing facilities, routine movement of mobile assets, such as ships and aircraft, for homeport reassignments, for repair, or to train/perform as operational groups where no new support facilities are required, and short-term increases in air operations.¹³² However, segmentation of actions is not allowed. This means that a federal agency cannot take one big project that certainly would qualify as “major” and split it into, for example, the upgrade of one building,¹³³ the refitting of another building,¹³⁴ the upgrade of pier facilities,¹³⁵ and the change of homeport of a ship,¹³⁶ and give each project a CATEX, thereby bypassing doing an EA or EIS.

2. Arguments Against Exemptions

There are many critics to the use of exemptions, exceptions, or waivers to environmental laws, and in particular its use by the military. In an article written by Mr. Joel Reynolds, a senior attorney with the National Resources Defense Council, Mr. Reynolds cites to the internment of Japanese Americans during World War II, which was upheld in *Korematsu v. United States*,¹³⁷ to

¹³¹ LTJG Jerome M. Altendorf, USCG, *Applying the National Environmental Policy Act’s (NEPA) Functional Equivalent Doctrine to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP)*, 2005 INTER’L OIL SPILL CONFERENCE, at 2. For a critique of the current process involving CATEX’s, see Kevin H. Moriarity, *Note: Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. Rev. 2312 (2004).

¹³² 32 C.F.R. §775.6(f); Chief of Naval Operations Inst. No. 5090.1C (Oct. 30, 2007).

¹³³ CATEX 14. *Id.*

¹³⁴ CATEX 8. *Id.*

¹³⁵ CATEX 8. *Id.*

¹³⁶ CATEX 11. *Id.*

¹³⁷ 323 U.S. 214 (1944).

showcase “judicial abdication” in face of military services use of the importance of defense readiness to support its actions.¹³⁸ In the environmental arena, he continues, similar claims have been asserted by the Navy in defending its compliance with environmental laws, but with “less success.”¹³⁹

After the end of the Cold War, Secretary of Defense Dick Cheney declared that “[d]efense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns.”¹⁴⁰ Seemingly gone were the days when the environmental consequences of preparing for war were ignored and the public was denied access to information about such consequences.¹⁴¹ In 1996, the Department of Defense (DOD) issued a directive announcing its policy to “display environmental security leadership within DOD activities worldwide” by “[e]nsuring that environmental factors are integrated into DOD decision-making process” and “[p]rotecting, preserving, and, when required, restoring and enhancing the quality of the environment.”¹⁴²

¹³⁸ Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL L. & POL’Y REV. 759, 759 (2008).

¹³⁹ *Id.* But note that his article was written before some of the cases he used as examples were concluded, and also be aware that “success” is all relative.

¹⁴⁰ Stephen Dycus, *Osama’s Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL L. & POL’Y REV. 1, 3 (2005) (quoting Sec’y of Def. Richard B. Cheney, Address to the Defense & Environment Initiative Forum (Sept. 3, 1990)).

¹⁴¹ *Id.*

¹⁴² *Id.* at 4 (quoting DOD Dir. No. 4715.1, Environmental Security (Feb. 24, 1996)). In 1996, the Department of Defense also issued the following instructions: DOD Inst. No. 4715.2, DoD Regional Environmental Coordination (May 3, 1996), DOD Inst. No. 4715.3, Environmental Conservation Program (May 3, 1996), DOD Inst. No. 4715.4, Pollution Prevention (Jun. 18, 1996, Change 1 issued Jul. 6, 1998), DOD Inst. No. 4715.5, Management of Environmental Compliance at Overseas Installations (Apr. 22, 1996), DOD Inst. No. 4715.6, Environmental Compliance (Apr. 24, 1996), DOD Inst. No. 4715.7, Environmental Restoration Program (Apr. 22, 1996), DOD Inst. No. 4715.9, Environmental Planning and Analysis (May 3, 1996), and DOD Inst. No. 4715.10, Environmental Education, Training and Career Development (Apr. 24, 1996). Subsequent instructions are DOD Inst. No. 4715.8, Environmental Remediation for DOD Activities Overseas (Feb. 2, 1998), DOD Inst. No. 4715.13, DOD Noise Program (Nov. 15, 2005), DOD Inst. No. 4715.14, Operational Range Assessments (Nov. 30, 2005), DOD Inst. No. 4715.15, Environmental Quality Systems (Dec. 11, 2005), DOD Inst. No. 4715.16, Cultural Resources Management (Sep. 18, 2008), DOD Inst. No. 4715.17, Environmental Management Systems (Apr. 15, 2009), and DOD Inst. No. 4715.18, Emerging Contaminants (ECS) (Jun. 11, 2009).

In the past decade, the Department of Defense and others in the George W. Bush administration have used the threat of a renewed terrorist attack to argue that environmental laws should be relaxed so as to enable the military to conduct proper training and for the development of new weapon systems necessary to execute the “war on terrorism.”¹⁴³ For example, in 2002, the Pentagon announced a multi-year campaign called Readiness and Range Preservation Initiative (RRPI), which was designed to promote sweeping changes the some of the most important environmental laws.¹⁴⁴ RRPI included proposals to amend the Clean Air Act, the Resources Conservation and Recovery Act, the Endangered Species Act, the Marine Mammal Protection Act, the Migratory Bird Treaty Act, the Comprehensive Environmental Recovery, Compensation and Liability Act, and perhaps even the Clean Water Act.¹⁴⁵ Meanwhile, the Pentagon began to make steps to push for regulatory reforms that would make it easier for the military to comply with these laws.¹⁴⁶

The Defense Department’s request for broader exemptions was, needless to say, contentious in Congress.¹⁴⁷ Some agreed that such exemptions are necessary to provide greater flexibility for combat training and other such readiness activities.¹⁴⁸ Other members of Congress, plus states, communities, and environmental organizations, opposed broader exemptions, concerned about the degree to which environmental requirements have

¹⁴³ Dycus, *supra* note 140, at 1.

¹⁴⁴ *Id.* at 1-2.

¹⁴⁵ *Id.* at 2.

¹⁴⁶ *Id.* (citing memo from Paul W. Mayberry to Sec’y of Military Dept’s et al., Senior Readiness Oversight Council Approval of 2003 Sustained Range Action Agenda (Dec 10, 2002), available at http://www.peer.org/docs/dod/DoD_2003attacks.pdf).

¹⁴⁷ U.S. Congressional Research Service. Exemptions from Environmental Law for the Department of Defense (FS22149: May 1, 2008), by David M. Bearden, at CRS-2 [hereinafter CRS Report – DoD Exemptions].

¹⁴⁸ *Id.*

compromised military readiness overall.¹⁴⁹ They also argued that expanding exemptions without a clear national security need could unnecessarily weaken environmental protection.¹⁵⁰

In response to the Department of Defense's request, the 107th Congress enacted an exemption from the Migratory Bird Treaty Act, and then the 108th Congress enacted exemptions from the Marine Mammal Protection Act, as well as from some designations of military lands as critical habitat under the Endangered Species Act.¹⁵¹ There was greater opposition to requests for exemptions to the Clean Air Act, Solid Waste Disposal Act, and CERCLA, and to date, Congress has not enacted these exemptions.¹⁵²

A study by the Congressional Research Service in 2005 said that "[a]lthough DOD has cited some example of training restrictions or delays at certain installations and has used these as a basis for seeking legislative remedies, the department does not have a system in place to comprehensively track these case and determine their impact on readiness."¹⁵³ This echoes what EPA Administrator Christine Todd Whitman said in early 2003: "I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."¹⁵⁴ Perhaps most strongly worded were Congressman John Dingell's remarks in 2002: "I have dealt with the military for years and they constantly seek to

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* DOD requested them in the Administration's defense authorization proposals for Fiscal Year 2003 through 2008, but the FY2009 defense authorization bill (H.R. 5658 and S. 2787) did not include the exemptions.

¹⁵³ Dycus, *supra* note 140, at 9 (*quoting* David M. Bearden, Exemptions from Environmental Laws for the Defense Department: An Overview of Cong'l Action (Cong. Res. Serv. RS 22149) (June 2, 2005, updated May 1, 2008) at 3, available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-10640:1>).

¹⁵⁴ *Id.* at 9-10 (*quoting* Eric Pianin, *Environmental Exemptions Sought; For Readiness Efforts, Pentagon Says It Needs Relief from Rules*, WASH. POST, Mar. 6, 2003, at A21 (discussing a hearing before the Senate Environment & Public Works Committee)).

get out from under environmental laws. But using the threat of 9-11 and al Qaeda to get unprecedented environmental immunity is despicable.”¹⁵⁵

The General Accounting Office conducted a study to determine the extent to which environmental requirements have affected military readiness, and in March 2008, issued its findings. It found that while environmental requirements did cause some training activities to be delayed, cancelled or altered, the readiness data did not indicate that those actions had hampered military readiness overall.¹⁵⁶

The House Armed Services Committee also directed GAO to look at the effect of military exemptions on the environment.¹⁵⁷ Based on information from regulatory agencies, GAO’s report in March 2008 did not identify any instances in which the use of the new exemptions from the Migratory Bird Treaty Act and the Endangered Species Act had adversely affected the environment.¹⁵⁸ However, as far as the effects from the Marine Mammal Protection Act exemptions, they could not yet be determined.¹⁵⁹

In the arena of military action versus environmental compliance, because of the potential gravity of a wrong decision, doubts are usually resolved against environmental interests, especially during time of war or a great national emergency.¹⁶⁰ Congress, however, included

¹⁵⁵ *Id.* at 10 (*quoting* Press Release, Comm. on Energy and Commerce Democrats, Bush Administration take Aim at Migratory Birds: Legislation Unilaterally Exempts Military from Environmental Law (Oct. 22, 2002), available at <http://archives.energycommerce.house.gov/press/107nr59.shtml>).

¹⁵⁶ CRS Report – DoD Exemptions, at CRS-3 (*citing* GAO, Military Training: Compliance with Environmental Laws Affects Some Training Activities, but DOD Has Not Made a Sound Business Case for Additional Environmental Exemptions, GAO-08-407, March 2008). GAO had issued prior reports with similar findings. GAO, Military Training: DOD lacks a Comprehensive Plan to Manage Encroachment on Training Ranges, GAO-02-614, June 2002, and GAO, Military Training: DOD Approach to Managing Encroachment on Training Ranges Still Evolving, GAO-03-621T, April 2003.

¹⁵⁷ CRS Report – DoD Exemptions, at CRS-3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Dycus, *supra* note 140, at 5.

provisions in most environmental statutes that allow for their temporary waiver on a case-by-case basis, in order to respond to these types of crises.¹⁶¹

III. Court Cases Involving the Emergency Exception

Because 40 C.F.R. § 1506.11 does not define “emergency” or give examples of what types of situations qualify for the exception, nor is there anything in the legislative history of the CEQ’s regulations, the next step is to turn to the courts. While only 41 emergency exceptions and alternative arrangements have been granted by CEQ, only three of those cases resulted in legal challenges through the federal court system. Consequently, there is a dearth of guidance.

A. Cases Decided Based Upon a Finding of the Applicability of the Emergency Exception

1. Crosby v. Young

The first case citing the emergency exception contained in section 1506.11, set the tone for its future uses.¹⁶² This case involved General Motor’s construction of a new plant, planned in 100 acres of residential and commercial land in Poletown, a part of Detroit (Central Industrial Park or “CIP”).¹⁶³ The residents of Poletown proposed a smaller site, and the issue was litigated in state court.¹⁶⁴ When that was unsuccessful, Plaintiffs filed in federal court, alleging, amongst other things that HUD released funds prior to the EIS, in violation of NEPA.¹⁶⁵ As for the timeline, HUD approved the loan to the city of Detroit on October 1, 1980, and released the funds on October 31, 1980.¹⁶⁶ The Draft EIS was issued on October 17, 1980, and the Final EIS

¹⁶¹ *Id.* at 4.

¹⁶² *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

¹⁶³ *Id.* at 1365.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1367.

¹⁶⁶ *Id.* at 1376.

was published on December 22, 1980, with the Record of Decision signed on February 10, 1981.¹⁶⁷

However, prior to approval of the Section 108 application, Detroit asked CEQ for guidance under section 1506.11 because emergency circumstances made it difficult to comply with CEQ regulations, and suggested alternative arrangements. CEQ agreed, and in their response, acknowledged that the CIP project could not go forward unless federal financial assistance was committed by October 1, 1980.¹⁶⁸

Plaintiffs argued that CEQ cannot permit federal action to begin before an EIS has been prepared, under NEPA section 4332(2)(C).¹⁶⁹ They did not claim that CEQ cannot modify or waive its own regulations, but that it lacked authority to change the statutory requirements of NEPA.¹⁷⁰ The District Court for the Eastern District of Michigan, Southern Division, disagreed.¹⁷¹ “It is immediately apparent that CEQ not only had the authority to waive its own regulations for Detroit, but also to interpret the provisions of NEPA to accommodate emergency circumstances.”¹⁷² Plaintiffs claimed that CEQ allowed the exception solely because the construction site needed to be cleared by May 1, 1981, and the elderly needed to be relocated before winter.¹⁷³ The court scoffed, saying that although those were some of the reasons cited in CEQ’s letter of concurrence, there were other factors, such as unemployment, crime, a decreasing tax base, and a decrease in bond rating below investment grade.¹⁷⁴ “The necessity of federal funds to complete the CIP project has never been questioned and it was the need to have a commitment from HUD, and not the relocation of persons before the onset of winter, that

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1380.

¹⁶⁹ *Id.* at 1384-85 (*citing* 24 C.F.R. § 58.17(f)(5)).

¹⁷⁰ Crosby, at 1385.

¹⁷¹ *Id.* at 1386.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

prompted the request.”¹⁷⁵ Accordingly, the court found that HUD, through Detroit’s actions, had been properly permitted to make alternative arrangements, and the release of the Section 108 loan guarantee before the completion of an EIS was proper.¹⁷⁶

2. National Audubon Society v. Hester

The U.S. Fish & Wildlife Service in December 1985 issued a permit authorizing the capture and removal of all six surviving wild California condors.¹⁷⁷ This was a change in their previous position, but was in response to the loss of six of the then fifteen wild condors over the winter of 1984-85.¹⁷⁸ The Service contacted CEQ, and CEQ certified that due to the urgent nature of the Service’s concerns about condor mortality, immediate documentation of the environmental effects of the proposal was unnecessary.¹⁷⁹ Plaintiffs, the National Audubon Society, sued for a preliminary injunction, and the District Court for the District of Columbia granted the injunction.¹⁸⁰ In its opinion, the court used language like “circumventing” and “avoid[ing]” compliance with NEPA, with regards to the Service’s actions.¹⁸¹ The court also pointed out that the only document explaining the need for an emergency exception was a letter from CEQ general counsel to the Director of the Service, stating that “[FWS] views this action as an emergency due to the precipitous decline in the number of Condors in the past year (6 Condors have been lost from the wild population).”¹⁸² The court concluded, “[t]his, however, is a questionable basis for the finding of an ‘emergency.’”¹⁸³ The six Condors referred to had been

¹⁷⁵ *Id.* at 1396-97.

¹⁷⁶ *Id.* at 1397.

¹⁷⁷ *Nat’l Audubon Soc’y v. Hester*, 627 F. Supp. 1419, 1421 (D.D.C. 1986). The remaining 20 condors were in zoos in Los Angeles and San Diego as part of breeding programs designed to prevent extinction. *Nat’l Audubon Soc’y v. Hester*, 801 F.2d 405, 405 (D.C. Cir. 1986).

¹⁷⁸ 627 F. Supp. at 1421.

¹⁷⁹ *Id.* at 1423.

¹⁸⁰ *Id.* at 1425.

¹⁸¹ *Id.* at 1423.

¹⁸² *Id.*

¹⁸³ *Id.*

lost eight months before the Service requested the exception, and the record was “very sparse and limited in support of FWS’ assertions.”¹⁸⁴

However, the Court of Appeals for the District of Columbia Circuit reversed.¹⁸⁵ It found that the Service’s decision constituted a “reasoned exercise of its discretion in fulfilling its statutory mandate....”¹⁸⁶ The Court of Appeal’s holding rested on a finding that FWS adequately complied with NEPA in its earlier EA and an Addendum issued after it changed its mind about the remaining six wild Condors.¹⁸⁷ In a footnote, it says that “in any event,” since CEQ’s interpretation of NEPA is entitled to substantial deference,¹⁸⁸ the District Court erred in saying that no emergency existed.¹⁸⁹

3. Valley Citizens for a Safe Environment v. West

In this, the only emergency exception case involving the military, the Plaintiffs were a nonprofit citizen’s association of approximately 350 members, all of who lived in communities bordering Westover Air Force Base in Massachusetts.¹⁹⁰ The Defendants were the Secretary of the Air Force, and the Chairman of the CEQ.¹⁹¹ The Plaintiffs sought a preliminary injunction to prevent the Air Force from flying C-5A transport airplanes in and out of Westover AFB between 10:00 p.m. and 7:00 a.m.¹⁹²

As history, in April 1987, the Air Force issued an EIS, evaluating the effects of the presence and operation of 16 C-5A planes on the environment, and then transferred planes to

¹⁸⁴ *Id.*

¹⁸⁵ 801 F.2d at 405.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 408.

¹⁸⁸ *Id.* at 408, n. 3 (*citing* *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)).

¹⁸⁹ *Id.*

¹⁹⁰ *Valley Citizens for a Safe Env. V. West*, 1991 U.S. Dist. LEXIS 21863, *1, n. 1 (D. Mass. May 6, 1991).

¹⁹¹ *Id.* at *1.

¹⁹² *Id.*

Westover AFB.¹⁹³ The Plaintiffs had filed to enjoin the transfer, but were denied by the District Court for the District of Massachusetts.¹⁹⁴ The EIS provided that no military activity would be routinely scheduled between 10:00 p.m. and 7:00 a.m.¹⁹⁵ Nonetheless, in September 1990, the Air Force began flying C-5A's on a 24-hour schedule, due to Operation Desert Storm.¹⁹⁶ Plaintiffs requested the Air Force to prepare a Supplemental EIS¹⁹⁷ in order to evaluate the environmental impacts of the nighttime flights, especially with regards to noise, but the Air Force refused.¹⁹⁸ Instead, it told the Plaintiffs that CEQ had granted emergency provisions and allowed the Air Force to forego with strict compliance with NEPA.¹⁹⁹ On March 25, 1991, Plaintiffs filed suit seeking declaratory and injunctive relief.²⁰⁰ Besides the claim for declaratory judge that Air Force had violated NEPA and CEQ regulations by failing to do an SEIS before beginning nighttime C-5A flights, they also sought declaratory judgment that CEQ had acted arbitrary and capricious by allowing Air Force to conduct such flights without NEPA compliance, and sought injunctive relief to stop the nighttime flights.²⁰¹

As the court noted, as of the date of its opinion on May 6, 1991, C-5A's continued to fly at Westover AFB both day and night, transporting machines, equipment, and military personnel to and from the Middle East.²⁰² The Air Force would not tell the court a set date that nighttime

¹⁹³ *Id.* at *3.

¹⁹⁴ *Id.* (citing *Valley Citizens for a Safe Env. v. Aldridge*, 695 F. Supp. 605 (D. Mass. 1988), *aff'd* by 886 F.2d 458 (1st Cir. 1989)).

¹⁹⁵ *Id.* at *4.

¹⁹⁶ *Id.* at *5.

¹⁹⁷ While NEPA does not explicitly require SEIS's, 40 C.F.R. section 1502.9 does require an SEIS under certain circumstances – if the agency makes substantial changes in the proposed action relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or impacts. *Valley Citizens*, 1991 U.S. Dist. LEXIS 21863 at *5, n. 5.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at *6.

²⁰¹ *Id.* at *6-7.

²⁰² *Id.* at *7.

operations would stop, but did indicated that it anticipated that the flights would end by July 1991.²⁰³

In deciding whether Defendants had violated NEPA by not doing an SEIS before beginning nighttime operations, the District Court for the District of Massachusetts first focused on language in NEPA itself.²⁰⁴ It began with the fact that while section 4332 of NEPA requires that an agency prepare an EIS with regard to proposed environmentally significant federal action “to the fullest extent possible,” section 4332 does not make completion of an EIS mandatory in all circumstances.²⁰⁵ The District Court stated that it would not read the Flint case as compelling an EIS under any circumstance unless statutory mandates conflict.²⁰⁶ “Congress could not have intended NEPA to cripple the quick response capabilities of federal agencies where failures to take immediate action could result in dire consequences.”²⁰⁷ The court next examined the language in NEPA section 4331, specifically the “consistent with other essential considerations of national policy,” to support its position that other goals or interests of the United States may make strict compliance with NEPA impossible.²⁰⁸

Finally, the District Court cited to section 1506.11, the emergency exception to NEPA, and its allowance of alternative arrangements.²⁰⁹ As a whole, the court concluded, the statutory language of NEPA and the applicable CEQ regulation make clear that while NEPA ordinarily

²⁰³ *Id.*

²⁰⁴ *Id.* at *10-11.

²⁰⁵ *Id.* (citing *Flint Ridge Dev. Co. v. Scenic River Assn.*, 426 U.S. 776, 788 (1976) (Supreme Court construed “to the fullest extent possible” as meaning must strictly comply unless such compliance would create an “irreconcilable and fundamental conflict” with other statutory obligations.”)).

²⁰⁶ *Valley Citizens*, 1991 U.S. Dist. LEXIS 21863 at *11, n. 6.

²⁰⁷ *Id.* The court felt its interpretation was consistent with NEPA section 4331 and case law from other jurisdictions, and cited *Nat’l Audubon Soc’y v. Hester*, 801 F.2d 405 (D.C. Cir. 1986) and *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).

²⁰⁸ *Valley Citizens*, 1991 U.S. Dist. LEXIS 21863 at *12 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976)).

²⁰⁹ *Valley Citizens*, 1991 U.S. Dist. LEXIS 21863 at *12-13.

requires completion of an EIS, or SEIS in this case, emergency circumstances may make completion of the NEPA document unnecessary.²¹⁰

In this case, the parties disagreed as to what constituted an “emergency.” Both the Air Force and CEQ determined that the continuing and unstable situation in the Middle East created an emergency.²¹¹ “Defendants contend that the C-5As at Westover AFB carry a steady stream of equipment and personnel essential to military operations at home and abroad, and that disruption of the twenty-four hour operation could create unmanageable scheduling and supply problems.”²¹² Plaintiffs, on the other hand, point out that even if an emergency existed before, the fighting ended in March 1991, and therefore there is no emergency now.²¹³

The court held that the decision by the Air Force and CEQ that the crisis in the Middle East constituted an emergency was not arbitrary and capricious, and granted Defendants’ motion for summary judgment.²¹⁴ Various Air Force officials provided affidavits describing a complex, global flight schedule that relied on the 24-hour availability of Westover AFB’s C-5A capabilities.²¹⁵ Westover AFB was one of the few bases in the United States capable of servicing, maintaining, and supplying C-5As, and one of only two C-5A staging bases in the United States for all operations in the Persian Gulf.²¹⁶ Looking at the evidence presented, the court found that the Defendants could reasonably interpret the current crisis to be an emergency within the meaning of NEPA and CEQ regulations, given the military’s operational and scheduling difficulties, and the hostile and unpredictable nature of the Persian Gulf region.²¹⁷

²¹⁰ *Id.* at *13.

²¹¹ *Id.*

²¹² *Id.* at *14.

²¹³ *Id.*

²¹⁴ *Id.* at *16, *21.

²¹⁵ *Id.* at *16.

²¹⁶ *Id.* at *17. The other base was Dover AFB, which was already operating a near maximum capacity. Stewart AFB did not have the C-5A parking and other capabilities, and so could not be used. *Id.*

²¹⁷ *Id.* at *17-18.

The court stressed that the Air Force did not try to justify the nighttime operations by vague assertions of national security or world peace.²¹⁸

Additionally, the court pointed out that alternative arrangements were agreed upon by Air Force and CEQ.²¹⁹ Air Force planned to do an EA by May 1991, analyzing alternative flight scheduling possibilities, noise impacts, and reduced nighttime operations.²²⁰ Although ruling against them, the court did sympathize with the Plaintiffs' situation, and threatened that if nighttime operations continued after July 1991, "this Court will not hesitate to invoke, where necessary, all of the equitable powers at its disposal to protect Valley Citizens' members from continued nighttime disturbances."²²¹

B. Cases Where the Emergency Exception Was Discussed But Decided on Other Grounds

1. Cohen v. Price Commission

Another early case in which the emergency exception was discussed was this 1972 case. Plaintiffs sued for injunctive relief alleging that an order of the Price Commission which authorized a five-cent subway and bus fare increase, toll increases on bridges and tunnels, and an increase in parking charges, violated NEPA in that the Commission failed to do a detailed statement on the impact, and failed to consult other agencies.²²² The District Court for the Southern District of New York denied their motion, finding that they had failed to show a likelihood of success,²²³ failed to show irreparable injury,²²⁴ and that the balance of hardship

²¹⁸ *Id.* at *18.

²¹⁹ *Id.*

²²⁰ *Id.* at *19.

²²¹ *Id.* at *20-21.

²²² *Cohen v. Price Comm'n*, 337 F. Supp. 1236, 1239 (S.D.N.Y. 1972).

²²³ *Id.* at 1242.

²²⁴ *Id.* at 1243.

avored the defendants.²²⁵ On the issue of likelihood of success, the court allowed that Defendants had not prepared a detailed statement of the environmental consequences of the proposed action, and had not submitted the action for consideration by other federal agencies.²²⁶ However,

...the Guidelines promulgated under NEPA clearly recognize that there may be emergency situations where the public interest requires immediate and prompt action.²²⁷ Each week that the proposed price increase was delayed would have endangered the continued viability of New York City's mass transit system and brought the City closer to total paralysis.²²⁸

The court in its holding considered the purpose of the Price Commission and the fact that Congress intended it to act quickly.²²⁹ Congress also exempted it from the Administrative Procedures Act, and limited the powers of the courts to use injunctive relief.²³⁰ The District Court went so far as to say that there was doubt as to the applicability of NEPA at all to the actions of the Price Commission.²³¹

2. Sierra Club v. Hassell

The Sierra Club and NRDC, private environmental groups, sued the Federal Highway Administration and U.S. Coast Guard, as well as state agencies, in 1981, claiming that Plaintiffs' failure to do an EIS violated NEPA.²³² They sought to enjoin the construction of a federally-funded bridge connecting Dauphin Island to mainland Alabama.²³³ The original bridge had been destroyed in Hurricane Frederic in 1979.²³⁴ After the hurricane, the President declared the area to be a major disaster zone, and Alabama State Highway Department requested federal funds to

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 1242.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Sierra Club v. Hassell*, 636 F.2d 1095, 1097 (5th Cir. 1981).

²³³ *Id.*

²³⁴ *Id.*

help restore damaged roads and bridges.²³⁵ Dauphin Island was partially developed, with several hundred full- and part-time residents, and a number of commercial and military establishments.²³⁶ The island also contained substantial wetlands, bird and wildlife habitats, and sites of archaeological importance.²³⁷

The District Court for the Southern District of Alabama denied injunctive relief, holding that Defendants complied with NEPA, by sufficiently considering potential adverse environmental impacts of the new bridge, alternatives, and mitigation measures.²³⁸ The Court of Appeals for the Fifth Circuit, affirmed, stating that the agencies found that an EIS was not necessary, and the record supports that they were reasonable in so concluding.²³⁹ It did go on to say that the decision did not mean that it would have been unreasonable or undesirable for the agencies to have classified this as a major action under NEPA, especially considering the project required \$30 million in funding, and a construction period of two years, which certainly look like “major action.”²⁴⁰ But the court continued that even if the Defendants had determined the project was a “major action,” they still could have found that the action would not have significant effects on the environment, and thus no EIS was necessary.²⁴¹ “Alternatively, the agencies might have chosen to prepare an impact statement pursuant to expedited procedures set forth in the regulations for emergency situations.”²⁴²

This result does not seem surprising, that the rebuilding of a bridge after a hurricane could be classified as an emergency. See section II.E. for a discussion of emergency action after Hurricane Katrina.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 1099.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* (citing 23 C.F.R. § 771.11; 40 C.F.R. § 1508.13).

²⁴² Hassel, 636 F.2d at 1099 (citing 23 C.F.R. § 771.16; 40 C.F.R. § 1506.11).

3. State of South Carolina v. O'Leary

In July 1993, the Secretary of Energy proposed a three-tiered way to deal with the Department of Energy's recent cease of receipt of foreign reactor spent fuel.²⁴³ First, the agency would do an EIS for the long-term plan for selecting a site and constructing a facility to receive 24,000 spent fuel rods from European research reactors.²⁴⁴ Second, an EA would be done for the immediate receipt of a few hundred spent fuel rods in urgent need of shipment for storage at an existing site in South Carolina.²⁴⁵ Lastly, they would ask for and receive declaration of an emergency situation under 40 C.F.R. § 1506.11 for reactor facilities whose situation was so urgent that they could not wait for EA completion.²⁴⁶

After the preparation of the EA, which was released in April 1994, the agency determined that 409 rods were in urgent need of shipment, and that there would be no significant environmental impact if shipped to the South Carolina site.²⁴⁷ In September 1994, South Carolina filed for an injunction to halt the shipment of the 409 rods, saying that the EA was inadequate, and an EIS was needed.²⁴⁸ The District Court granted the injunction.²⁴⁹ At that time, 153 of the rods were already onboard vessels in the Atlantic Ocean, and on September 23, 1994, the Court of Appeals for the Fourth Circuit stayed the injunction, holding that South Carolina had failed to show harm sufficient to outweigh the United States' foreign policy interest in

²⁴³ *State of South Carolina v. O'Leary*, 64 F.3d 892 (4th Cir. 1995). Part of the U.S.' longstanding policy for the nonproliferation of nuclear weapons was the practice to try to convert foreign nuclear reactors from using highly-enriched uranium which also may be used to make nuclear weapons, to low-enriched uranium, which cannot. Under this program, the U.S. would accept highly-enriched spent nuclear rods from European research facilities for storage in the U.S., and in turn, supplied nuclear fuel to these facilities. We would reprocess the spent fuel rods back into research reactors, or into our own nuclear weapon program. At the end of the Cold War, we stopped reprocessing spent fuel rods, but still permanently stored spent fuel rods. *Id.* at 894-95.

²⁴⁴ *Id.* at 895.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 896.

²⁴⁹ *Id.*

receiving the spent fuel rods.²⁵⁰ In January 1995, the District Court issued a permanent injunction for further shipments, stating that DOE had improperly segmented the receipt of 24,000 rods.²⁵¹ However, the Fourth Circuit once again went against the District Court, and reversed its judgment and injunction.²⁵² It concluded that DOE had fulfilled its responsibilities under NEPA by doing an EA. Interestingly, it did not discuss the use of section 1506.11.

4. NRDC v. Pena

In another case involving the Department of Energy, Plaintiffs, more than thirty public interest organizations concerned about environmental waste and nuclear proliferation,²⁵³ claimed that DOE had to complete a Supplemental Programmatic EIS (SPEIS) for its Stockpile Stewardship and Management (SSM) Program.²⁵⁴ Part of the program was the reestablishment of plutonium pit production at Los Alamos National Laboratory in New Mexico, and to initiate construction and operation of the National Ignition Facility at Lawrence Livermore National Laboratory in California.²⁵⁵ In 1996, DOE had done a Programmatic EIS for the Stockpile Program, but now Plaintiffs claimed that there existed new information concerning potential environmental hazards at Los Alamos and Livermore facilities, thus necessitating a Supplemental PEIS to consider the changed circumstances.²⁵⁶ The DOE maintained that they had met their obligations under NEPA and no SPEIS was needed.²⁵⁷ In May 1997, Plaintiffs filed a motion for preliminary injunction, seeking to enjoin the construction of new facilities and major upgrades to mission capabilities.²⁵⁸ Plaintiffs argued that the PEIS failed to address

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 900.

²⁵³ NRDC v. Pena, 20 F. Supp. 2d 45, 46 (D.D.C. 1998).

²⁵⁴ *Id.* The program was designed to ensure the safety and reliability of the nation's aging nuclear weapons.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 47.

DOE's entire proposed SSM plan, and that it failed to vigorously explore and objectively evaluate reasonable alternatives to the SSM plan.²⁵⁹

In August 1997, the District Court for the District of Columbia denied Plaintiff's motion on grounds that the Plaintiff did not appear likely to succeed on the merits, and that national security interests associated with implementing the SSM Program outweighed Plaintiff's immediate environmental concerns.²⁶⁰ Then in January 1998, Plaintiffs filed motion for leave to amend the complaint, based on the new information it had.²⁶¹ In response, the Defendants prepared two Supplement Analyzes under DOE's NEPA regulations,²⁶² and based on these, determined that it did not need to do an SPEIS.²⁶³ The parties entered into settlement negotiations, resulting in the DOE agreeing to prepare another Supplement Analysis, concentrating on implementation of plutonium pit production at Los Alamos, and if certain conditions were met, it would do an SPEIS.²⁶⁴

The District Court then dismissed Plaintiff's complaint as not being ripe.²⁶⁵ Plaintiffs argued that the Defendants were just stalling, but the court felt that DOE made the offers in good faith.²⁶⁶ The court order said

[i]n the event the President's Council on Environmental Quality issues an exemption to DOE pursuant to 40 C.F.R. § 1506.11 on national security emergency grounds for any of the actions identified in this Order, DOE may begin

²⁵⁹ *Id.* at 47-48.

²⁶⁰ *Id.* at 48.

²⁶¹ *Id.* at 48. It specifically alleged that the new information about recent scientific studies and independent review by the Defense Nuclear Facilities Safety Board revealing serious seismic and safety risks associated with Los Alamos, the DOE's recent decision to use weapon grade plutonium in the same building as plutonium 238, increasing the chances of plutonium fires like those that occurred at Rocky Flats, a new congressionally mandated plan to design and build larger pit production facilities at multiple sites, and new proposals to conduct experiments at Livermore using hazardous and radioactive materials. *Id.*

²⁶² *Id.*; 10 C.F.R. 1021.314(c).

²⁶³ Pena, 20 F. Supp. 2d at 48.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 49.

²⁶⁶ *Id.*

implementation of such exempted action before completing the NEPA document required by this Order.²⁶⁷

It is interesting that the court seemingly *sua sponte* raised the issue of the emergency exception, and moreover, in doing so, characterized it as a “national security emergency” exception, contrary to the language in the regulation which does not mention national security at all.

5. Miccosukee Tribe of Indians of Florida v. United States

In this 2007 case, the Plaintiff, the Miccosukee Tribe²⁶⁸ challenged a series of water management decisions made by the Defendant, the U.S. Army Corps of Engineers, which were designed to avoid harm to the endangered Cape Sable seaside sparrow in the Everglades National Park, while at the same time administering Congressionally authorized programs²⁶⁹ aimed at balancing the water needs of Florida.²⁷⁰ One of the water delivery methods had negative effects on the sparrow population in the Everglades, which caused the U.S. Fish & Wildlife Service to ask the Army Corps of Engineers to reduce water levels in the nesting habitat.²⁷¹ The Army Corps of Engineers requested and received approval from CEQ for emergency alternative arrangements, and deviated from its current operations.²⁷² Part of the alternative arrangements was that it would prepare an EA after it began its new course of operations, and that it would ultimately prepare an EIS for longer-term plans.²⁷³ A Draft EIS was issued in February 2001, and after the public comment period and meetings, the Corps issued a Supplemental EIS,

²⁶⁷ *Id.* at 50.

²⁶⁸ *Miccosukee Tribe of Indians of Florida v. United States*, 509 F. Supp. 2d 1288 (S.D. Fla. 2007). Intervenor were NRDC, Florida Wildlife Federation, Izaak Walton League of America, National Park Conservation Association, National Wildlife Federation, the Sierra Club, and the Cape Sable seaside sparrow (who was dismissed for lack of standing). *Id.* at 1289.

²⁶⁹ The Central and Southern Florida Project for Flood Control and Other Purposes, part of the Flood Control Act of June 30, 1948, and the report was published in House Document No. 643, 80th Congress, Second Session.

²⁷⁰ *Miccosukee*, 509 F. Supp. 2d at 1290.

²⁷¹ *Id.*

²⁷² *Id.* at 1289.

²⁷³ *Id.* at 1291.

choosing to implement an alternative that had not even been in the Draft EIS.²⁷⁴ The Final EIS was issued in May 2002, with this new alternative, and the Record of Decision was published July 3, 2002.²⁷⁵

Plaintiffs filed suit in September 2002, alleging violations of both NEPA and the Endangered Species Act.²⁷⁶ The District Court for the Southern District of Florida granted summary judgment in favor of Plaintiffs on the NEPA issue, dismissing all the others, and ordered the Corps to do a Supplemental EIS that included the changes.²⁷⁷ The Corps did so, and a Final Supplemental EIS was issued on December 21, 2006.²⁷⁸ In March 2007, the District Court asked the parties if there remained any issues, and Plaintiffs filed this suit for injunctive relief, alleging that the Final SEIS was inadequate.²⁷⁹ The District Court denied the motion, holding that Plaintiffs failed to show that it was inadequate, a requirement to issuing an injunction.²⁸⁰

In this case, the issue of whether an emergency exception existed that justified the grant of alternative arrangements to completing a full EIS before the Corps' initial plans took place was not discussed by the court, not having been challenged by the Plaintiffs. But it can serve as an illustration of what may constitute "emergency" – the possible destruction of the habitat of an endangered species.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* Plaintiffs also alleged violations of the APA, 5th Amendment due process, the Indian Trust doctrine, the Federal Advisory Committee Act, as well as nuisance under federal common law and improper delegation of agency authority. *Id.*

²⁷⁷ *Id.* at 1291-92. *See Miccosukee Tribe of Indians v. United States*, 420 F. Supp. 2d 1324 (S.D. Fla., 2006).

²⁷⁸ *Id.* at 1292.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 1295.

6. Hale v. Norton

In 2002, plaintiffs, the Hales, purchased 410 acres of land in Alaska.²⁸¹ The property was surrounded by National Park, and access to the property was by way of a road that the state of Alaska had classified as abandoned in 1938.²⁸² In the spring of 2003, the Hales' house on the property burned down, and in the rebuilding, the Hales used a bulldozer on the road in order to transport building material, without getting authorization from the National Park Service.²⁸³ In July 2003, the Hales contacted the National Park Service about obtaining a permit to use the road.²⁸⁴ The Park Service responded promptly, and offered assistance in the preparation of the permit application.²⁸⁵

In September 2003, the Hales submitted an "emergency" application, saying that they needed to get their supplies in before the "freeze up."²⁸⁶ The Park Service asked for more information about the nature of the emergency, and also pointed out that others in the area are able to use bulldozers in the winter months, and in fact, the frozen ground helps protect the land.²⁸⁷ Since the Hales wanted to travel on unfrozen ground, which causes significantly more damage, the Park Service informed them that an Environmental Assessment would need to be done.²⁸⁸ The Park Service also told the Hales that it did not see this as falling within the emergency exception to NEPA, under section 1506.11.²⁸⁹

²⁸¹ Hale v. Norton, 476 F.3d 694, 696 (9th Cir. 2007).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

The Park Service offered to complete the EA in nine weeks, and would cover the costs itself, but that the Hales still needed to provide more information.²⁹⁰ The Hales did not respond, and instead sued in November 2003.²⁹¹ The District Court for the District of Alaska denied the motion for injunction, and dismissed the case for lack of subject matter jurisdiction.²⁹² The Court of Appeals for the Ninth Circuit held that there was subject matter jurisdiction, but upheld the denial of injunctive relief, holding that the Park Service had acted reasonably in requiring an EA.²⁹³

While the Ninth Circuit did not discuss whether section 1506.11 could have been used to relieve the Park Service of some of the requirements of NEPA, the case is useful to show what an agency considers to be an “emergency.” Moreover, even if a court thought that the agency was wrong and that the Hales’ situation did constitute an emergency, it is doubtful that they would have found the Park Service’s actions as unreasonable, given the deference to agency decisions.

IV. Navy Mid-Frequency Active [MFA] Sonar Litigation Cases

A. Training and MFA

The Fleet Response Training Plan (FRTP) is one of the Navy’s ways to comply with the Chief of Naval Operation’s obligation under 10 U.S.C. § 5062, which requires organization, training, and equipping of all naval forces for combat.²⁹⁴ The FRTP is an arduous training cycle

²⁹⁰ *Id.* at 697.

²⁹¹ *Id.* Plaintiffs sought an injunction requiring NPS to provide adequate access to their property, and a declaratory judgment that NPS for violating their right-of-way over the road by requiring a permit, as well as that issuing a permit for the road did not constitute major federal action subject to NEPA requirements.

²⁹² *Id.* The court held that there was no final agency action that permitted review under the Administrative Procedure Act, 5 U.S.C. § 704.

²⁹³ *Hale*, 476 F.3d at 700-01.

²⁹⁴ Decision Memorandum Accepting Alternative Arrangements for the U.S. Navy’s Southern California Operating Area Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) Scheduled To Occur Between Today and January 2009, 73 Fed. Reg. 4189, 4189 (Jan. 24, 2008) [hereinafter Navy’s Acceptance].

that ensures that naval forces achieve the highest possible readiness levels before deploying.²⁹⁵ As a part of the FRTP, the Navy engages in Composite Training Unit Exercises (COMPTUEX) and Joint Task Force Exercises (JTFEX) in order to achieve this required readiness.²⁹⁶ Both COMPTUEX and JTFEX exercise are included in the integrated phase of training for United States and some allied forces, which requires a synthesis of both individual units and of staff into a coordinated Strike Group, one that is prepared for surge and readiness certification.²⁹⁷

Anti-submarine warfare is the Pacific Fleet's top war-fighting priority, and essential to the nation's defense.²⁹⁸ Today's quiet, diesel-electric submarines have state-of-the-art sound silencing technologies, and sound isolation technologies.²⁹⁹ Moreover, the use advanced propulsion systems that include high endurance battery systems, and air-independent propulsion systems.³⁰⁰ These advances, together with special hull treatments that significantly dampen submarine noise and reduce its vulnerability to active sonar prosecution, make them highly potent adversaries.³⁰¹ Detecting, identifying, tracking, and if required, neutralizing these diesel-electric submarines is vitally important to the U.S. Navy's ability to conduct operations and ultimately prevail in conflict.³⁰²

Diesel-electric submarines such as these can operate covertly in coastal and open oceans, blocking Navy access to combat zones and increasing American vessels' vulnerability to torpedo and anti-ship missile attacks.³⁰³ Submarines are operated by a number of navies, including potential adversaries in the Asia-Pacific and Middle East areas. U.S. Navy Strike Groups are

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 4189-90.

²⁹⁷ *Id.* at 4190.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

continuously deployed to these high-threat areas.³⁰⁴ Accordingly, in preparing for these missions, the thousands of service members that comprise a Pacific Fleet Strike Group must train in the use of MFA sonar in a coordinated manner, in a realistic environment, prior to deployment.³⁰⁵ The Southern California Operating Area is uniquely suited to COMPTUEX and JTFEX because it contains all the land, air, and at-sea bases necessary for conducting the exercises, and the shallow coastal areas realistically simulate areas where the Navy is likely going to encounter hostile submarines.³⁰⁶

Mid-frequency active (MFA) sonar emits pulses of sound from an underwater transmitter in order to determine the size, distance, and speed of objects in the water.³⁰⁷ The sound waves bounce off objects and reflect back as an echo to underwater acoustic receivers.³⁰⁸ It has a range up to ten nautical miles,³⁰⁹ and operates within the 1 kHz to 10 kHz frequency range.³¹⁰ MFA sonar has been in use since World War II, and “is the only reliable way to identify, track, and target submarines.”³¹¹ Active sonar is different from passive sonar in that passive sonar only receives sound waves; it does not emit them.³¹² According to the Navy, passive sonar is ineffective at detecting quiet submarines, such as those that run on batteries rather than nuclear reactors, which are noisy.³¹³

Scientists have suggested that MFA sonar may harm certain marine mammals, especially beaked whales. Opponents of MFA sonar point out that sonar is emitted at 170 to 195 decibels, which is about eight to ten times louder than the levels for which OSHA requires hearing

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ See <http://www.navy.mil/oceans/sonar.html>.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Navy’s Acceptance, *supra* note 294, at 4190.

³¹¹ See <http://www.navy.mil/oceans/sonar.html>.

³¹² *Id.*

³¹³ *Id.*

protection for humans.³¹⁴ However, noise intensities in the air and the water differ, because of the different densities of the media, and therefore are not comparable.³¹⁵ Excessive noise can damage the ears of mammals, or can disorient the animals so that they surface too quickly, giving them “the bends,” which can be fatal.³¹⁶ Strandings are also a possible effect of noise.

The Navy agrees that sonar can harm marine mammals under some circumstances, but argues that the Navy takes additional protective measures to avoid such harm.³¹⁷ In a December 20th, 2007 press release, the Navy stated that it takes 29 mitigation measures to protect marine mammals during military exercises involving sonar, and that no injuries to marine mammals has been attributed to sonar use since the measures were put in place in January, 2007.³¹⁸

The habitat and species contained in the Southern California Operating Area have been monitored over the last 40 years, during the same time period that the Navy has been using MFA sonar.³¹⁹ There have been no documented incidents of harm, injury, or death to marine mammals resulting from their exposure to MFA sonar, nor have there been stranding incidents or population-level effects.³²⁰ No systematic declines in marine mammal stocks have occurred, and in fact, the stocks of many species, such as the blue and humpback whales, harbor seals, and common dolphins are either stable or improving.³²¹ Strandings of small cetaceans and California sea lions are common, usually attributed to fishery interaction, disease, or harmful algae

³¹⁴ CRS Report, *supra* note 3, at CRS-1; 29 C.F.R. § 1910.95(a).

³¹⁵ CRS Report, *supra* note 3, at CRS-1.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at CRS-1-2 (*citing* Navy Invests in Protecting Marine Mammals, Story No. NN5071220-22 (Dec. 20, 2007)).

³¹⁹ Navy’s Acceptance, *supra* note 294, at 4190.

³²⁰ *Id.*

³²¹ *Id.* The Eastern North Pacific gray whale stock increased and the species was removed from the Endangered/Threatened Species List, but unfortunately is currently experiencing habitat changes due to ice melting patterns.

blooms.³²² There have been several individual beaked whale strandings, and these also are usually caused by fishery interaction, or disease.³²³ The cause of some of these strandings is unknown, but there has been no apparent link to MFA sonar.³²⁴

B. Winter v. NRDC Litigation History

In order to understand the Navy's invocation of 40 C.F.R. § 1506.11, it is important to shift through the procedural history of the case and how it got to the Supreme Court. The issue of the Navy's use of sonar in training exercises and the impact on marine mammals has been brewing for years.³²⁵ Legal challenges to the use of low-frequency sonar were before the District Court for the Northern District of California, but were settled by the Navy in 2008.³²⁶ The challenges to the use of mid-frequency active [MFA] sonar were first heard in the District Court for the Central District of California.³²⁷ The lead plaintiff in the MFA case was the Natural Resources Defense Council (NRDC), a non-governmental environmental group, whose mission is "to safeguard the Earth – its people, plants and animals, and the natural systems on which life depends."³²⁸ Four other environmental groups, the International Fund for Animal Welfare, the Cetacean Society International, the League for Coastal Protection, and Ocean Futures Society were plaintiffs, as well as Jean-Michel Cousteau, son of famed oceanographer Jacques Cousteau. The defendants were the Secretary of the Navy, Secretary of Commerce, the National Marine Fisheries Service (NMFS), the Assistant Administrator for Fisheries of the National Oceanographic and Atmospheric Administration

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ NRDC first sued the Navy over low-frequency active sonar in 2003. See *NRDC v. Evans*, 364 F. Supp. 2d 1083 (N.D. Cal. 2003). However, NRDC claims that it first brought the issue of ocean noise to the public's awareness in 1995. Reynolds, *supra* note 138, at 775. Also, NRDC sued the Navy in 1994 for "ship shock." *NRDC v. U.S. Dept. of the Navy*, 857 F. Supp. 734 (C.D. Cal. 1994).

³²⁶ *NRDC v. Gutierrez*, No. 07-4771-EDL (N.D. Cal. August 12, 2008) (order approving the settlement agreement wherein the Navy agreed to limit low-frequency sonar training to certain areas of the Pacific Ocean, rather than the worldwide scope as originally planned).

³²⁷ *NRDC v. Winter*, 2006 U.S. Dist. LEXIS 97385 (C.D. Cal. Jul. 5, 2006). MFA sonar was also at issue in the District Court of Hawaii, in *Ocean Mammal Institute v. Gates*, 546 F. Supp. 2d 960 (D.C. Haw. 2008).

³²⁸ See <http://www.nrdc.org/about/>.

(NOAA), and the Administrator of NOAA.³²⁹ The plaintiffs claimed that the Navy had violated three laws: the Endangered Species Act (ESA), the Coastal Zone Management Act (CZMA), and NEPA.³³⁰

On August 6th, 2007, the district court granted plaintiffs' request for a preliminary injunction to halt the eleven remaining Navy training exercises that were planned.³³¹ The court agreed that the plaintiffs were likely to prevail on their claims under the CZMA and NEPA, but held that the ESA claim was not likely to succeed.³³² Since neither NEPA nor CZMA provides a right to sue, the court reviewed the claims brought under these statutes under the standard set by the Administrative Procedures Act -- whether the agency action was arbitrary and capricious.³³³

In February 2007, the Navy had prepared an EA under NEPA, and found that there were no significant adverse environment effects that would require preparing an EIS.³³⁴ It did conclude, however, that there could be, as a result of the training exercises, 170,000 "takes,"³³⁵ mostly Level B harassment, of marine mammals, including 8000 "temporary threshold shifts" to marine mammals, and 466 permanent injuries to beaked or ziphiid whales, some of which are endangered.³³⁶ The district court said that plaintiffs had showed a probability of success in their claims that the Navy should have prepared an EIS after finding these effects, and that the Navy did not adequately review alternatives to its training plan.³³⁷

³²⁹ Brief for the Petitioners at II, *Winter v. NRDC*, 129 S. Ct. 365 (2007) (No. 07-1239).

³³⁰ *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, *6 (C.D. Cal. Aug. 7, 2007).

³³¹ There were 14 total exercises in COMPTUEX and JTFEX. *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, *4 (C.D. Cal. Aug. 6, 2007).

³³² *NRDC v. Winter*, 2006 U.S. Dist. LEXIS 97385 (C.D. Cal. July 5, 2006).

³³³ 5 U.S.C. § 706(2).

³³⁴ Brief for the Petitioners, *supra* note 329, at 8-10.

³³⁵ "Take" under the Endangered Species Act, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

³³⁶ *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, *4 (C.D. Cal. 2007).

³³⁷ *Id.* at *21. The court also found that there was a likelihood that the Navy violated the CZMA. According to the Navy, the MFA training was consistent with the state CMP because it would not affect California's coastal resources, and the Navy did not need to adopt the mitigation measures California deemed necessary. The court suggested that the Navy's determination that its exercises would not harm coastal resources could be found arbitrary and capricious.

The court issued a preliminary injunction, halting the use of MFA sonar during the challenged COMPTUEX and JTFEX exercises planned in the Southern California range through January 2009.³³⁸ The Navy appealed, and on August 31, 2007, the Ninth Circuit Court of Appeals stayed the injunction, and ordered an expedited briefing.³³⁹ Later, in November, after the briefing, the Ninth Circuit vacated the stay, enjoining again the Navy from conducting MFA exercises, and remanded the case to the district court to enter a modified preliminary injunction containing appropriate mitigating conditions.³⁴⁰

On January 3, 2008, the district court again issued a preliminary injunction, containing seven specific mitigation measures.³⁴¹ Those measures were:

- a 12-nautical mile coastal exclusion zone;
- a 2200-yard MFA sonar shut down;
- monitoring;
- use of helicopter dipping sonar;
- a reduction of MFA sonar decibels when surface ducting conditions are found;
- no MFA sonar use in Catalina basin, a “choke point” for animals; and
- continued use of mitigation measures from the 2007 National Defense Exemption.³⁴²

On January 9th, 2008, the Navy asked the district court to stay its decision pending appeal.³⁴³ The district court narrowed the mitigation measures and issued a modified preliminary injunction on January 10th, 2008.³⁴⁴ That same day, on January 10th, 2008, the Navy asked CEQ for alternative arrangements to NEPA, under 40 C.F.R. § 1506.11, that would allow them to conduct the remaining training exercises

³³⁸ *Id.* at *34.

³³⁹ NRDC v. Winter, 502 F.3d 859, 865 (9th Cir. 2007).

³⁴⁰ NRDC v. Winter, 508 F.3d 885, 887 (9th Cir. 2007).

³⁴¹ NRDC v. Winter, 530 F. Supp. 2d 1110, 1118-21 (C.D. Cal. 2008).

³⁴² *Id.*

³⁴³ NRDC v. Winter, 513 F.3d 920, 921 (9th Cir. 2008).

³⁴⁴ *Id.*

as scheduled, while an EIS was being completed.³⁴⁵ CEQ said the Navy indicated that two of the mitigation measures required by the district court would "create a significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable."³⁴⁶ The then-Chief of Naval Operations, Admiral Gary Roughead, explained that "[t]he southern California operating area provides unique training opportunities that are vital to prepare our forces, and the planned exercises cannot be postponed without impacting national security."³⁴⁷ On January 15th, 2008, CEQ provided alternative arrangements that paralleled the 2007 National Defense Exemption mitigation measures.³⁴⁸

Also on January 15th, 2008, the President of the United States exempted the Navy exercises from compliance with the CZMA, using the authority under 16 U.S.C. § 1456(c)(1)(B).³⁴⁹ The President determined that the use of MFA sonar in the exercises was "in the paramount interest of the United States..." and the training and certification of carrier and expeditionary strike groups was "essential to national security."³⁵⁰

Because of these two exemptions, the Navy went back to the Ninth Circuit and asked it to vacate the injunction.³⁵¹ The Ninth Circuit remanded the action to the district court on January 16, 2008, for it to determine the effects of these developments on the preliminary injunction.³⁵²

On February 4th, 2008, the district court held that the CEQ's action was beyond the scope of the regulation and was therefore invalid.³⁵³ It also held that when 40 C.F.R. § 1506.11 was drafted, CEQ used the phrase "emergency circumstances" to refer to "sudden, unanticipated events, not the unfavorable

³⁴⁵ Letter from James L. Connaughton, Chairman, CEQ, to Donald C. Winter, Secretary of the Navy (Jan. 15, 2008), at 3, available online at [http://georgebush-whitehouse.gov/ceq/Letter_from_Chairman_Connaughton_to_Secretary_Winter.pdf].

³⁴⁶ *Id.*

³⁴⁷ News Release, Department of Defense, Navy Granted Authority To Use Sonar In Training Off California (Jan. 16, 2008), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11622>.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ NRDC v. Winter, 527 F. Supp. 2d 1216, 1224 (C.D. Cal. 2008).

³⁵¹ NRDC v. Winter, 513 F.3d 920, 921 (9th Cir. 2008).

³⁵² *Id.* at 922.

³⁵³ NRDC, 527 F. Supp. 2d at 1219.

consequences of protracted litigation. CEQ's contrary interpretation in this case is 'plainly erroneous and inconsistent' with the regulation and, concomitantly, not entitled to deference."³⁵⁴ The court held that the Navy still had to comply with NEPA, and its injunction remained in place and the Navy could conduct MFA training only if it used the required mitigation measures.³⁵⁵ The court stated that public interest was best served by requiring those mitigation measures, and this way the Navy would have the benefit of conducting training, and the natural resources would have limited harm from the training.³⁵⁶ The district court questioned the constitutionality of the President's CZMA exemption, but did not rule on it, satisfied that the injunction stood firmly on NEPA grounds.³⁵⁷

The Navy sought to have the injunction stayed, since the next scheduled exercises were to begin in March, but the Ninth Circuit denied the request.³⁵⁸ Then on February 29th, 2008, the Ninth Circuit rejected the Navy's appeal of the preliminary injunction.³⁵⁹ The Ninth Circuit found that the district court did not abuse its discretion in finding that CEQ's interpretation of emergency circumstances was overly broad.³⁶⁰ The Ninth Circuit described the course of the litigation that ended in the injunction as "a series of events [that] gives rise to a predictable outcome, and not an unforeseeable one demanding unusual or immediate action."³⁶¹

In a separate opinion, the Ninth Circuit modified two of the mitigation measures required by the district court, after the Navy argued that two of the measures would significantly limit its ability to conduct anti-submarine training and jeopardize its ability to certify its strike groups as ready for deployment.³⁶² The Ninth Circuit allowed the 2,200-yard suspension to remain in place unless the training was at "a critical point in

³⁵⁴ *Id.* at 1229.

³⁵⁵ *Id.* at 1232.

³⁵⁶ *Id.* at 1239.

³⁵⁷ *Id.* at 1237-38.

³⁵⁸ *NRDC v. Winter*, 516 F.3d 1103, 1106 (9th Cir. 2008).

³⁵⁹ *NRDC v. Winter*, 518 F.3d 658, 703 (9th Cir. 2008).

³⁶⁰ *Id.* at 680.

³⁶¹ *Id.* at 682.

³⁶² *NRDC v. Winter*, 518 F.3d 704, 705 (9th Cir. 2008).

the exercise," in which case the Navy would reduce the sonar by 6 decibels if a marine mammal was detected within 1,000 meters from the sonar source, reduce by 10 decibels if within 500 meters, and suspend the activity if within 200 meters of the sonar source.³⁶³ The second modification was for when significant surface ducting conditions were detected.³⁶⁴ Rather than shutting down the training, the Ninth Circuit required the Navy to similarly reduce and suspend the decibels of the activity.³⁶⁵ Therefore, the Navy could conduct its training exercises, provided it used the new mitigation measures indicated by the court, along with the other undisputed measures.

The Navy petitioned for writ of certiorari to the U.S. Supreme Court to review the Ninth Circuit decision,³⁶⁶ and the Supreme Court agreed to review the claims.³⁶⁷ The Navy raised two issues: whether the CEQ permissibly construed its own regulation in finding emergency circumstances, and whether the injunction based on NEPA violations was appropriate.³⁶⁸ The injunction argument disputed whether the court adequately balanced the public interest in protecting marine mammals in granting the injunction against the public interest in national defense if the Navy training program were modified.³⁶⁹

As far as the first issue, regarding the CEQ's finding that an emergency circumstance did exist, the petitioners argued that not only are CEQ's regulations are entitled to substantial deference,³⁷⁰ CEQ's interpretation of the term "emergency circumstance" in that regulation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation' itself."³⁷¹ Accordingly to petitioners, and

³⁶³ *Id.* at 705-06.

³⁶⁴ *Id.* at 706.

³⁶⁵ *Id.* at 706.

³⁶⁶ Reply Brief for the Petitioners, *Winter v. NRDC*, 129 S. Ct. 365 (2008) (No. 07-1239).

³⁶⁷ *Winter v. NRDC*, 128 S. Ct. 2964 (2008).

³⁶⁸ Brief for the Petitioners, *supra* note 329 at I.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 22 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989)).

³⁷¹ Brief for the Petitioners, *supra* note 329, at 23 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 US 504, 512 (1994)).

strongly contested by respondents in lower court proceedings,³⁷² the definition of “emergency” does not just mean unexpected or unforeseen – it is an urgent circumstance demanding prompt action.³⁷³

...[A]n ‘emergency situation’ exists when an immediate response is needed to avert a significant impending harm to the public interest, and for that reason, ‘[a]n assessment of blame regarding [the cause] of the predicament ... is quite frankly irrelevant to a determination of whether [the government] is faced with an ‘emergency situation.’³⁷⁴

Respondents contended otherwise in earlier proceedings, arguing that “emergency” requires the event to be unexpected, and in this case, the Navy knew since 2006 when the exercises were being planned that it would need to do an EIS.³⁷⁵ An example that petitioners used to show common use is if a cardiac patient does not take his heart medication, and goes into cardiac arrest; the resulting medical crisis is no less an “emergency” requiring immediate attention simply by the fact that it was foreseen.³⁷⁶ Or for that fact, because the patient may have contributed to its cause.³⁷⁷ Certainly case law is full of examples of anticipated emergencies, such as an air traffic controllers’ strike.³⁷⁸ Moreover, previous cases dealing with

³⁷² Respondents’ brief in reply to the petition did not argue the definition of “emergency” but instead argued that CEQ did not have the authority to re-determine a factual issue made by the district court. Brief for the Respondents at 19, *Winter v. NRDC*, 129 S. Ct. 365 (2008) (No. 07-1239).

³⁷³ Brief for the Petitioners, *supra* note 329, at 24. See e.g. Webster’s Ninth New Collegiate Dictionary 407 (1984) (def. 2: “an urgent need for assistance or relief”); The Random House Dictionary of the English Language 636 (2d ed. 1987) (“A situation demanding immediate action,” which is “usually unexpected;” “exigency”); Black’s Law Dictionary 522-23 (6th ed. 1990) (listing multiple definitions, including “perplexing contingency or complication of circumstances,” “exigency” and “pressing necessity”); see also, e.g. The Oxford American Dictionary and Language Guide 313 (1999) (“a sudden state of danger, conflict, etc., requiring immediate action”); The Living Webster Encyclopedic Dictionary of the English Language 321 (1971) (“A sudden, usu. unexpected, occasion or combination of events calling for immediate action.”); Webster’s Third New International Dictionary of the English Language 741 (1967) (def. 1c: “a usu. distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen.”).

³⁷⁴ Brief for the Petitioners, *supra* note 329, at 26 (*quoting* *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 866 (2d Cir. 1988), cert. denied 489 U.S. 1077 (1989)).

³⁷⁵ In lower court opinions, Respondents also argued that the case did not turn on the definition of “emergency” because there was no urgent need since the District Court found that the Navy could train and certify its Strike Groups. Brief for the Respondents, *supra* note 372, at 22.

³⁷⁶ Brief for the Petitioners, *supra* note 329, at 25.

³⁷⁷ *Id.*

³⁷⁸ *Id.* (*citing* *Letenyey v. Dept of Transp.*, 735 F.2d 528, 531-32 (Fed. Cir. 1984); *United Steelworkers v. United States*, 372 F.2d 922, 924 (D.C. Cir. 1966) (*per curiam*); 29 U.S.C. §§ 176, 178).

40 C.F.R. § 1506.11 support the view that “emergency” can mean a situation requiring an urgent need for action, even if the situation is of the requesting agency’s own making.³⁷⁹

In this case, petitioners argued that the emergency was the district court’s order demanding an EIS before vital military exercises could effectively proceed.³⁸⁰ The Navy’s need to carry out its mission in the wake of the President, its Commander-in-Chief’s conclusion that it is critically important to the country’s security constituted a genuine emergency.³⁸¹ Therefore, the petitioners argued, the Ninth Circuit erred when it deferred to the district court’s reading of the regulation and what constitutes an “emergency,” even after the court recognized that it can mean something requiring immediate attention.³⁸² As petitioners pointed out, the Navy completed a robust EA, and concluded in good faith that an EIS was not necessary for the exercises to occur prior to completion of an EIS, which was expected in January 2009.³⁸³ Even though the district court found that the Navy’s conclusions were likely wrong, it was very reasonable for the Navy to believe its conclusion was correct.³⁸⁴ No emergency arose until the court ruled otherwise, and imposed an injunction jeopardizing the Navy’s ability to train strike groups for deployment.³⁸⁵

During oral arguments, Justice Souter posed the question of whether the “emergency” was of the Navy’s own making, by its failure to take timely action to do an EIS back when it decided to do the exercises, and therefore CEQ’s emergency exception did not apply.³⁸⁶ The answer both by the government and by Justice Scalia was that the Navy did comply with NEPA in good faith by doing an EA before the exercises began.³⁸⁷ This was not an emergency because the Navy failed to do an EIS; it was an

³⁷⁹ Brief for the Petitioners, *supra* note 329, at 30-31 (*citing* Miccosukee Tribe of Indians v. U.S. Army Corps of Engineers, 509 F. Supp. 2d 1288 (S.D. Fla. 2007); Valley Citizens for Safe Env. v. Vest, 1991 U.S. Dist. LEXIS 21862 (D. Mass. 1991)).

³⁸⁰ Brief for the Petitioners, *supra* note 329, at 25.

³⁸¹ *Id.* at 26.

³⁸² *Id.* at 27.

³⁸³ *Id.* at 32.

³⁸⁴ *Id.* at 32 (*citing* U.S. Postal Service v. Gregory, 534 U.S. 1, 10 (2001)).

³⁸⁵ Brief for the Petitioners, *supra* note 329, at 32.

³⁸⁶ Transcript of Oral Argument at 18, *Winter v. NRDC*, 129 S. Ct. 365 (2008) (No. 07-1239).

³⁸⁷ *Id.* at 20.

emergency because contrary to the fact that that it complied with NEPA by doing in EA, it was now being stopped by the district court and Ninth Circuit from conducting the exercises in a way that would properly train its sailors. Failure to train and certify the Strike Group is an emergency.³⁸⁸

Furthermore, the petitioners argued, even if the court does not grant the customary deference to CEQ's interpretation of its own regulation, it should be particularly reluctant to disregard the President's determination concerning the urgency of these training exercises.³⁸⁹ In fact, during oral arguments before the Supreme Court, Justice Alito asked Mr. Richard B. Kendall, NRDC's attorney, "[i]sn't there something incredibly odd about a single district judge making a determination on that defense question [whether the injunction will permit the Navy to train and certify its sailors] that is contrary to the determination that the Navy has made?"³⁹⁰

Besides the disagreement over the proper definition of "emergency," the respondents argued that because CEQ merely rubber-stamped the Navy's position when it granted the alternative arrangements, its decision was not entitled to deference.³⁹¹ They also thought that CEQ's decision was especially deficient in light of the fact that it has no expertise regarding naval training.³⁹² Interesting, though, that in the respondents' opinion, the district court could determine what level of training is sufficient.

³⁸⁸ For a non-sonar example of why repeated training in real-world scenarios is vital to the Navy, see the JAGMAN Command Investigation into the Fire that Occurred Onboard USS GEORGE WASHINGTON (CVN-73) on 22 May 2008 (July 1, 2008), available at http://www.cpf.navy.mil/content/foia/washington/FOIA_GW_Fire_investigation.pdf.

³⁸⁹ Brief for the Petitioners, *supra* note 329, at 26.

³⁹⁰ Transcript of Oral Argument at 30, NRDC, 129 S. Ct. 365 (No. 07-1239). Mr. Kendall's answer was "no."

³⁹¹ Brief for the Respondents, *supra* note 372, at 32-33 (*citing* *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962)).

³⁹² Brief for the Respondents, *supra* note 372, at 32 (*citing* *Adams Fruit Co., v. Barrett*, 494 U.S. 638, 649-50 (1990) (no deference owed to agency acting outside its expertise)).

C. Supreme Court Ruling

1. Majority's Avoidance of the Emergency Exception Issue

The Supreme Court, in a 5-4 opinion, reversed the Ninth Circuit and vacated the injunction to the extent that the Navy had challenged it.³⁹³ Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito, and Justice Breyer concurred in part and dissented in part and was joined by Justice Stevens.³⁹⁴ Justice Ginsburg wrote the dissenting opinion, joined by Justice Souter.³⁹⁵ The majority decided the case solely on the second issue, whether the preliminary injunction was appropriate, and decided it was not.³⁹⁶ The Court focused primarily on the competing interests – NRDC's "ecological, scientific, and recreational interests in marine mammals,"³⁹⁷ versus "the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines,"³⁹⁸ and held that the Navy's interest "plainly outweighed" NRDC's.³⁹⁹

2. Dissent's Opinion of No Emergency Exception

While the majority steered clear of the issue of whether CEQ had properly granted alternative arrangements to the Navy under 40 C.F.R. § 1506.11, the dissent spent the majority of its opinion on it, as well as the purpose behind NEPA.⁴⁰⁰ If the Navy had followed NEPA and completed the EIS before taking action, the dissent argues, both the parties and the public would have benefited from the environmental analysis, and the Navy could have proceeded with its training without interruption.⁴⁰¹ "Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve."⁴⁰² The Navy, in an attempt to justify its actions, sought dispensation not from Congress, but from the CEQ, an

³⁹³ Winter v. NRDC, 129 S. Ct. 365, 370 (2008).

³⁹⁴ *Id.* at 369.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 382.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 382-91 (Ginsburg, J., dissenting).

⁴⁰¹ *Id.* at 387.

⁴⁰² *Id.*

executive council that lacks authority to countermand or revise NEPA's requirements, the dissent continues.⁴⁰³ These actions both undermined NEPA and took "an extraordinary course."⁴⁰⁴ Had the Navy done a legally sufficient EIS before beginning the exercises, NEPA would have functioned how it was intended to: the EIS process, including the public input, might have convinced the Navy to voluntarily adopt mitigation measures, and its training would not have been impeded.⁴⁰⁵

The dissent also agreed with one of respondent's many arguments as to why CEQ's decision was conclusory and insufficient to set aside the district court's findings and injunction -- the fact that the Navy submitted material to CEQ that supported only its side, and that neither the Navy nor CEQ ever notified NRDC about the request for alternative arrangements.⁴⁰⁶ "CEQ's hasty decision on a one-sided record is no substitute for the District Court's considered judgment based on a two-sided record."⁴⁰⁷

Regardless, even if CEQ's review had been exemplary, the dissent felt that CEQ lacked authority to absolve an agency of its duty under NEPA to prepare an EIS.⁴⁰⁸ This is a more fundamental problem than just the fact that the alternative arrangements that CEQ granted did not vindicate NEPA's objectives.⁴⁰⁹ CEQ was established by NEPA to assist and advise the President on environmental policy,⁴¹⁰ and an Executive Order charged CEQ with issuing regulations for implementation of NEPA's procedural provisions.⁴¹¹ The dissent then argues that although 40 CFR § 1506.11 "indicates that CEQ may play an important consultative role in emergency circumstances, ... [the Supreme Court has] never suggested that CEQ could eliminate the statute's command."⁴¹²

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 389.

⁴⁰⁵ *Id.* at 390.

⁴⁰⁶ See Brief for the Respondents, *supra* note 372, at 22.

⁴⁰⁷ *Id.* at 391.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*; 42 U.S.C. § 4342.

⁴¹¹ NRDC, 129 S. Ct. at 391.

⁴¹² *Id.*

The dissent also points out that the Navy had other options, including requesting assistance from Congress, and obtained authorization to proceed with planned activities without fulfilling NEPA's requirements.⁴¹³ "The Navy's alternative course – rapid, self-serving report to an office in the White House – is surely not what Congress had in mind when it instructed agencies to comply with NEPA 'to the fullest extent possible.'"⁴¹⁴

While the dissent makes an impassioned argument that the Navy has illegally by-passed NEPA, it ignores the fact that the Navy did prepare an EA before the exercises. It consulted with other agencies. The EA was submitted to the public. Not every federal action requires an EIS, and by going the EA route, the Navy did not contravene the "informational and participatory purpose"⁴¹⁵ behind NEPA.

D. Present Status of MFA

MFA sonar use by the Navy is not going to go away, and will likely be challenged at every turn. Several key congressional lawmakers have recently called on the National Oceanographic & Atmospheric Administration (NOAA) to strengthen the mitigation measures that the Navy must comply with when using MFA.⁴¹⁶ "The review, while focused on East Coast and Gulf of Mexico sonar activities, is considered by environmentalists to be precedent-setting for how sonar will be addressed at the various ranges off other coasts as well. 'I think it's a watershed' for the sonar issue, one environmentalist says."⁴¹⁷ Earlier this year, CEQ asked NOAA to reexamine the mitigation measures for the Navy's Atlantic Fleet Active Sonar

⁴¹³ *Id.* at 390 (citing Floyd D. Spence National Defense Authorization Act for Fiscal year 2001, Pub. L. 106-398, § 317, 114 Stat. 1654a-57 (exempting the military from preparing a programmatic EIS for low-level flight training); 42 U.S.C. § 10141(c) (2009) (exempting EPA from preparing an EIS for the development of criteria for handling spent nuclear fuel and high-level radioactive waste); 43 U.S.C. § 1652(d) (2009) (exempting construction of the trans-Alaska oil pipeline from further NEPA compliance)).

⁴¹⁴ NRDC, 129 S. Ct. at 391, citing 42 U.S.C. § 4332.

⁴¹⁵ NRDC, 129 S. Ct. at 390.

⁴¹⁶ *Senators Pressure NOAA to Tighten Mitigation on Navy Sonar*, 17 DEF. ENVTL ALERT, Aug. 4, 2009.

⁴¹⁷ *Id.*

Training (AFAST) area, which is the largest of a series of training ranges for which the Navy has asked for take authorizations related to sonar use.⁴¹⁸

Just recently, on July 31, 2009, the Navy issued its Record of Decision for the construction of an undersea warfare training range (USWTR), a 500-square nautical mile shallow-water range off the coast of Florida, used for anti-submarine warfare training.⁴¹⁹ Concerns about the use of MFA sonar and impact on marine wildlife were raised at the public scoping meetings and during the public comment periods.⁴²⁰ Since the publication of the Record of Decision, environmental groups are reported to be contemplating litigation.⁴²¹ “Environmentalists say the Navy’s final environmental impact statement on the development fails to adequately address environmental impacts, particularly to the right whale.”⁴²² Even the Environmental Protection Agency has expressed concern about marine impacts in the construction and operation of USWTR.⁴²³

Perhaps following the environmentalist’s focus on USWTR, will be the Gulf of Mexico (GOMEX) Range Complex. The GOMEX Range Complex is a combination of both sea and airspace where the Navy and the Marine Corps conduct training, including use of MFA sonar.⁴²⁴ The Navy is currently preparing an EIS.⁴²⁵

⁴¹⁸ *Id.*

⁴¹⁹ See http://projects.earthtech.com/uswtr/USWTR_index.htm for website containing the OEIS/EIS and other information about USWTR.

⁴²⁰ USWTR OEIS/EIS, pg 7-2, 7-5, 7-8, 7-13. See also *Worries Over Navy Sonar at Whale Birthing Area, Georgia, Florida state agencies Among Those Concerned*, AP, Mar. 13, 2009, available at <http://www.msnbc.msn.com/id/29678135/>.

⁴²¹ *Senators Pressure NOAA to Tighten Mitigation on Navy Sonar*, 17 DEF. ENVTL ALERT, Aug. 4, 2009.

⁴²² *Id.*

⁴²³ Hind Sabir, *EPA Expresses Concern About Motorized Travel, Undersea Warfare Training*, TARGETED NEWS SERV., Aug. 7, 2009.

⁴²⁴ See <http://www.gomextrangecomplexeis.com/RangeSustainability.aspx>.

⁴²⁵ See <http://www.gomextrangecomplexeis.com/EIS.aspx#background>.

V. Factors That Could Impact the Potential Success of the Emergency Exception

Critics argue that CEQ is not authorized to create a NEPA exception, only Congress is. They point to the fact that when Congress has seen an emergency, it acted to create specific agencies. Courts then have excused these agencies from complying with NEPA because of Congress' determination of the exigent circumstances of the emergency. The inference is that when Congress intends an emergency exception from NEPA, it will affirmatively create one.⁴²⁶

While an agency's interpretation of its regulations is ordinarily entitled to substantial deference by reviewing courts,⁴²⁷ "where an agency's interpretation defies the plain meaning of a regulation, courts have rejected the agency's interpretation."⁴²⁸ Until the *Winter v. NRDC* case, that had not happened before in the context of the emergency exemption.⁴²⁹

The criticisms of section 1506.11 boil down to three arguments: 1) CEQ exceed the scope of authority granted to it by Executive Order No. 11991, and therefore section 1506.11 is *ultra vires*; 2) the lack of definition of the term "emergency" may lead to more expansive interpretations; and 3) the fear of the possibility that courts may grant a high degree of deference to CEQ's determination.⁴³⁰ Although all three arguments have at least some merit, only the second criticism will be explored more fully below. Of note is the fact that only the *ultra vires* argument was raised by the respondents in *Winter v. NRDC*.

A. Lack of a Bright-Line Test

In the law, nothing is better than a bright-line test. A bright line test is where the result is objectively rather than subjectively determined; where the presence or absence of a particular

⁴²⁶ Orsi, *supra* note 34, at 496. See example in *Cohen v. Price Commission*, 337 F. Supp. 1236 (S.D.N.Y. 1972).

⁴²⁷ See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309-1310 (1974).

⁴²⁸ See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

⁴²⁹ CRS Report, *supra* note 3, at CRS-10.

⁴³⁰ Orsi, *supra* note 34.

factor or factors determines the outcome.⁴³¹ However, when it comes to what constitutes an emergency under 40 C.F.R. § 1506.11, there is no such test. Nor has any court that has dealt with the emergency exception to NEPA articulated a bright-line test. The Supreme Court in *Winter v. NRDC* had the opportunity to speak to this issue, and yet chose not to, deciding the case instead on the balancing of interests prong of the test for appropriateness of an injunction. In the context of military action, though, the District Court for the District of Massachusetts felt that the decision to call the crisis in the Middle East in the early 1990's, even after the Gulf War had concluded, an emergency was not arbitrary and capricious. The current world situation is not much different, and perhaps even more dangerous, with new enemies cropping up. The military's need to train given these situations is a given, and therefore the prevention of such training is certainly an emergency.

B. Using Other Statutes

a. Definition of "Emergency" in the Environmental Arena

Because "emergency" is not defined in NEPA or CEQ's regulations, it is illustrative to look at other environmental statutes to see how they handle emergency situations. Under the Federal Insecticide, Fungicide and Rodenticide Act, the EPA Administrator may, at his or her discretion, exempt any federal or state agency from compliance with FIFRA if he or she determines that emergency conditions exist.⁴³² The Act does not define "emergency," but does say that the Administrator shall consult with the Secretary of Commerce and the Governor of the state concerned when determining whether emergency conditions exist.⁴³³ Furthermore, the regulations implementing FIFRA say that there are four types of authorized emergency

⁴³¹ THE LAW DICTIONARY, 2002, available at LEXIS.

⁴³² 7 U.S.C. § 136p (2009).

⁴³³ 7 U.S.C. § 136p.

exemptions: specific, quarantine, public health, and crisis exemption.⁴³⁴ Crisis exemption is one that may be used in an emergency condition when the time from the discovery of the emergency to the time when the pesticide use is needed is not long enough to allow for the authorization of a specific, quarantine, or public health exemption.⁴³⁵

The Wilderness Act allows for road building in the wilderness, otherwise prohibited, during “personal health and safety emergencies.”⁴³⁶ It appears to narrow “emergencies,” a proposition that is aided by a different provision that says that certain measures may be taken as may be necessary in the control of fire, insects, and diseases.⁴³⁷

The Robert T. Stafford Disaster Relief and Emergency Assistance Act provides a NEPA exemption for immediate response actions.⁴³⁸ For disasters and emergency relief actions abroad, Executive Order 12,114 allows for exemptions from environmental review requirements.⁴³⁹

The only federal environmental law that actually defines “emergency” is the Marine Protection Research and Sanctuaries Act, otherwise known as the Ocean Dumping Act, which allows for dumping of industrial waste in emergencies,⁴⁴⁰ and permits vessels to scuttle cargo and waste during emergencies.⁴⁴¹ Section 1412a states, “[a]s used herein, ‘emergency’ refers to situations requiring actions with a marked degree of urgency.” This definition is precisely the argument used by the Navy in *Winter v. NRDC*. The Navy did not cite to the MPRSA, though.

b. “Emergency” vs. National Security Interests

While some environmental laws have emergency exceptions, a far greater number have national security exceptions. It can be argued that national security interests are a particular type

⁴³⁴ 40 C.F.R. § 166.2 and (d).

⁴³⁵ 40 C.F.R. § 166.2 and (d).

⁴³⁶ 16 U.S.C. § 1133(c) (2009).

⁴³⁷ 16 U.S.C. § 1133(d)(1).

⁴³⁸ 42 U.S.C. § 5159.

⁴³⁹ Exec. Order 12,114, § 2-5, 44 Fed. Reg. 1957 (Jan. 4, 1979).

⁴⁴⁰ 33 U.S.C. § 1412a (2009).

⁴⁴¹ 40 C.F.R. § 220.

of emergency, and of course, not every emergency is a national security interest. But is every national security situation an emergency?

Conflicts certainly exist between the requirements of environmental laws and the protection of national security, although there are some who believe that such conflicts are avoidable with proper planning and foresight.⁴⁴² The military understands this conflict only too well. As RADM Robert T. Moeller, Deputy Chief of Staff of Operations, Plans and Policy, U.S. Pacific Fleet, stated in 2003,

[w]e face numerous challenges and adversaries that threaten our way of life. The President has directed us to ‘be ready’ to face this challenge. To fulfill this directive, we must conduct comprehensive and realistic combat training – providing our sailors with the experience and proficiency to carry out their missions. This requires appropriate use of our training ranges and operating area and testing weapon systems. The Navy has demonstrated stewardship of our natural resources. We will continue to promote the health of lands entrusted to our care. We recognize the responsibility to the nation in both these areas and seek your assistance in balancing these...requirements.⁴⁴³

Although NEPA does not have a specific national security exemption from its requirement to prepare an environmental review of major federal actions significantly affecting the environment, the Act does contain language that could be viewed as allowing federal agencies sufficient flexibility to prevent it from being showstopper to national security goals.⁴⁴⁴ As an example, NEPA section 4331(b) provides that the government shall “use all practicable means, consistent with other essential considerations of national policy” and section 4332 only

⁴⁴² Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL L.J. 105, 108 (2007) (citing STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 185 (1996) (declaring that “with rare exceptions, we can maintain a strong effective defense without endangering the public health or destroying our national resources.”)).

⁴⁴³ *Id.* at 108, n. 8 (quoting Readiness and Range Preservation Initiative: Testimony Before the Comm. On House Resources, 108th Cong. (2003) (statement of RADM Moeller), quoted in Natalie Barefoot-Watamba, *Comment, Who is Encroaching Whom? The Balance Between our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. MIAMI L. REV. 577, 598 (2005)).

⁴⁴⁴ *Id.* at 115.

requires that a federal agency conduct environmental reviews “to the fullest extent possible.”⁴⁴⁵ Courts have generally been protective of the military, when faced with a conflict between NEPA mandates and military needs.⁴⁴⁶ However, critics are quick to point out that “[t]o the military, training and operations are on-going needs – not an emergency exception,”⁴⁴⁷ an argument that certainly cuts against the Navy’s position in *Winter v. NRDC*.

Other environmental statutes have specific exemptions for military action, and the lack of one in NEPA could be interpreted to mean that Congress intended it that way, intending the military to comply fully with NEPA under all circumstances. Conversely, the fact that Congress has seen 41 instances of CEQ granting alternative arrangements under the emergency exception, nine of which going to the Department of Defense, and have not taken legislative action could mean their acquiescence.

These exemptions to federal environmental laws that Congress has granted provide authority for suspending compliance requirements for actions at federal facilities on a case-by-case basis.⁴⁴⁸ Some are specific to military installations, rather than all federal facilities.⁴⁴⁹ Most of the exemptions can only be granted by the President, and not the head of the agency or department.⁴⁵⁰ Most are for activities that are in the “paramount interest of the United States” and some are specific to national security or national defense.⁴⁵¹ Of note, none of the

⁴⁴⁵ *Id.* See also Willard et al., *supra* note 118, at 81.

⁴⁴⁶ Babcock, *supra* note 442, at 115 (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981) (refusing to require the Navy to prepare a hypothetical EIS before completing facilities capable of storing nuclear weapons, saying that an EIS would not be required unless the Navy actually stored the nuclear weapons at the facilities, even though the Navy, for national security reasons, could neither admit or deny that it proposed to store nuclear weapons there)).

⁴⁴⁷ *Id.* at 117 (citing 40 C.F.R. § 85.1708).

⁴⁴⁸ CRS Report-DoD Exemptions, *supra* note 147, at CRS-1.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

exemptions contain criteria for determining whether an activity meets the applicable threshold.⁴⁵²

The President or other authorized decision-maker has the discretion to make this determination, depending on the statute.⁴⁵³

The Department of Defense's position is that obtaining exemptions on a case-by-case basis is onerous due to the large number of training exercises routinely conducted on hundreds of military installations.⁴⁵⁴ A separate argument is that the time limits placed on most exemptions, which generally are one or two years, are incompatible with ongoing or recurring training activities.⁴⁵⁵

Under the Marine Mammal Protection Act, maritime military actions may be exempted if the Secretary of Defense, after conferring with the Secretary of Commerce, determines that the action is necessary for national defense.⁴⁵⁶ The exemption is good for up to two years, and additional exemption periods are allowed. The MMPA also has other accommodations for military actions – it has a different definition of “harassment” when the action is part of military readiness activities, which effectively means that more harm is required before it rises to the statutory level of harassment. Finally, under the MMPA’s “incidental take permits” provisions, for the Department of Defense, the factors considered in determining the “least practical adverse impact” include personnel safety, practicality of implementation, and impact on the effectiveness of the activity.⁴⁵⁷

While not particular to the military, the Coastal Zone Management Act has an exemption for compliance with a state Coastal Management Program if the action is in the paramount

⁴⁵² *Id.* at CRS-2.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* However, most time periods can be renewed.

⁴⁵⁶ P.L. 108-136, § 319(f), 117 Stat. 1434.

⁴⁵⁷ 16 U.S.C. § 1371(a)(5)(A)(ii) (2009).

interest of the United States.⁴⁵⁸ However, this determination must be made by the President, not the head of the federal agency, and is not available until after a court has ruled against the agency.⁴⁵⁹

The President, if he finds that it is necessary in the interest of national defense or security, can waive compliance with the Toxic Substance Control Act,⁴⁶⁰ the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),⁴⁶¹ and the Emergency Planning and Community Right-to-Know Act.⁴⁶² The Noise Control Act allows exemptions for reasons of national security.⁴⁶³ The Endangered Species Act states that the Committee shall grant an exemption from prohibited takes for any agency action if the Secretary of Defense finds that is necessary for reasons of national security.⁴⁶⁴ Provisions in the Clear Air Act allow for some exemptions in the interest of national security⁴⁶⁵ or if it is in the paramount interest of the United States.⁴⁶⁶ The President can grant relief to federal agencies from the requirements of the

⁴⁵⁸ 16 U.S.C. § 1456(c) (2009).

⁴⁵⁹ CRS Report, *supra* note 3, at CRS-5.

⁴⁶⁰ 15 U.S.C. § 2621 (2009) (“The Administrator shall waive compliance with any provision in this chapter upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.”)

⁴⁶¹ 42 U.S.C. § 9620(j) (2009) (“The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protection the national security interests of the United States at that site or facility.”).

⁴⁶² 42 U.S.C. §§ 1100-11050 (2009), and Exec. Order No. 13,148, 65 Fed. Reg 24,595 (April 26, 2000), which applies EPCRA to federal agencies (“Subject to Subsection 902(c) of this order and except as otherwise required by applicable law, in the interest of national security, the head of an agency may request from the President an exemption from complying with the provisions of any or all provisions of this order for particular agency facilities....”).

⁴⁶³ 42 U.S.C. § 4909(b)(1) (2009).

⁴⁶⁴ 16 U.S.C. § 1536(j) (2009). The ESA also contains a provision allowing for exemptions in presidentially declared disaster areas. 16 U.S.C. § 1536(p) (2009).

⁴⁶⁵ 42 U.S.C. § 7412(i)(4) (2009) (“The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than two years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so.”).

⁴⁶⁶ 42 U.S.C. § 7418(b) (2009) (The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so.... In addition to any such exemption..., the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance...any weaponry, equipment, aircraft, vehicles or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including Coast Guard) or by the National Guard of any state and which are uniquely military in nature.”).

Safe Drinking Water Act when it would be in the paramount interests of national defense.⁴⁶⁷

Under the Resource Conservation and Recovery Act (RCRA), the President can determine it to be in the paramount interest of the country to exempt any federal solid waste management facility⁴⁶⁸ or underground storage tanks⁴⁶⁹ from compliance.

The Clean Water Act has act of God and act of war exemptions,⁴⁷⁰ and defines “act of God” as meaning an act “occasioned by an unanticipated grave natural disaster.”⁴⁷¹ Similarly, CERCLA and the Oil Pollution Act have acts of God/acts of war defenses.⁴⁷² The National Historic Protection Act allows for disaster waivers, as well as for national security threats.⁴⁷³

Executive Order 12,114, Environmental Effects Abroad of Major Federal Actions, besides the disaster exemption, also contains an exemption for “actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict.”⁴⁷⁴

The Administrative Procedure Act has a semblance of a national security exemption.⁴⁷⁵ Section 701(b)(1)(G) excludes from the definition of “agency” any “military authority exercised in the field in the time of war or in occupied territory.” However, courts have narrowly interpreted this provision.⁴⁷⁶ “Although they are loath to interfere in command relationships⁴⁷⁷ or

⁴⁶⁷ 42 U.S.C. § 300h-7(h) (2009).

⁴⁶⁸ 42 U.S.C. § 6961(a) (2009).

⁴⁶⁹ 42 U.S.C. § 6991f(a). Similar provisions apply to treatment, storage and disposal facilities.

40 C.F.R. § 264.1(g)(8).

⁴⁷⁰ 33 U.S.C. § 1321(f) (2009).

⁴⁷¹ 33 U.S.C. § 1321(a)(12).

⁴⁷² 42 U.S.C. § 9607(b)(1); 33 U.S.C. § 2703(a).

⁴⁷³ 16 U.S.C. § 470h-2(j) (2009) (The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the even of a major natural disaster or an imminent threat to national security).

⁴⁷⁴ Exec. Order No. 12,114, § 2-5(iii), 44 Fed. Reg. 1957 (Jan. 4, 1979).

⁴⁷⁵ Willard et al., *supra* note 118, at 80.

⁴⁷⁶ *Id.*

⁴⁷⁷ *See Chappell v. Wallace*, 462 U.S. 296 (1983).

the military's decisions on training and equipping,⁴⁷⁸ they have not given military departments much deference when it comes to application of other statutory schemes.”⁴⁷⁹

VII. Conclusion

The fight over the Navy's use of sonar and its potential affect on marine mammals is certainly not over. The Navy, as well as all military branches, follows the requirements of NEPA and CEQ's regulations to the best of its ability, the vast majority of the time. It does not make decisions about the environmental impacts of its actions, be they training, or the movement of an aircraft carrier to a new homeport,⁴⁸⁰ in a vacuum. Agencies such as the EPA, the U.S. Fish & Wildlife Service, NOAA, and the National Marine Fisheries Service are all consulted and they weigh in on the impacts. And yet, the military faces opposition and the threat of lawsuits and injunctions at every turn.

While the Navy did nothing wrong in the preparation of an Environmental Assessment during the events challenged in *Winter v. NRDC*, hopefully the lesson learned is to prepare an Environmental Impact Statement sufficiently ahead of time, thus not necessitating the need for 40 C.F.R. § 1506.11 and its emergency exception. For the Navy should not pin its hopes on a court's interpretation of “emergency,” even though some case law and other environmental statutes support the Navy's broad definition in *Winter v. NRDC*. Moreover, the arguments against section 1506.11's legality have some merit; not only could a court decide that the situation does not merit an “emergency” status, but could find the whole section unconstitutional.

⁴⁷⁸ See *Gilligan v. Morgan*, 413 U.S. 1 (1973).

⁴⁷⁹ Willard et al., *supra* note 118, at 80 (*citing* *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991) (holding that plaintiff's challenge to a Health and Human Services rulemaking allowing military to use unapproved, investigational drugs was outside the military authority exception)).

⁴⁸⁰ See 62 Fed. Reg. 44,954 (Aug. 25, 1997) for the Record of Decision for Facilities Development Necessary to Support the Homeporting of a Nimitz-Class Aircraft Carrier at the Naval Station, Mayport, Florida.

A better course of action instead, would be for NEPA to contain a national security exemption, like other environmental laws do. In the statute itself, rather than in CEQ's regulations lends credibility to its legality, and shows congressional intent. Furthermore, the new exemption should provide that only the President could exempt federal action, not CEQ or EPA, much less the Secretary of Defense or the Secretaries of the various military departments. This way there is uniformity, as well as some sort of checks and balances.

“Train as we fight” is not just a phrase in the Navy and other services; it is a statement of the absolute necessity for realistic training and for preparing service members for the conditions in which they may find themselves. It is training to prepare for the national defense of us all.